15-7 US 643

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~189~~. ~~691~~ 366

JAMES STEWART, PLAINTIFF IN ERROR,

*vs.*

DANIEL S. C. McHARRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED APRIL 13, 1894.

(15,573.)

# (15,573.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1893.

No. 1189.

JAMES STEWART, PLAINTIFF IN ERROR,

*vs.*

DANIEL S. C. McHARRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, between James Stewart (appellant), plaintiff in error, and Daniel S. C. McHarry (respondent), defendant in error, wherein the said James Stewart claimed a right, title and privilege, under statutes of the United States, and that the decision of said Supreme Court was against the right, title and privilege claimed by said James Stewart, a manifest error hath happened, to the great damage of the said James Stewart, plaintiff in error, as by his complaint appears, and it being fit, that the error, if any there had been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, District of Columbia, on the seventeenth day of April next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of February, in year of our Lord one thousand eight hundred ninety-four, and of the independence of the United States the one hundred and eighteenth.

[SEAL.] W. J. COSTIGAN,

*Clerk U. S. Circuit Court, Ninth Judicial Circuit, Northern District of California.*

The above writ of error is hereby allowed.

W. H. BEATTY,

*Chief Justice of the Supreme Court of California.*

[Endorsed:] Filed Feb. 19, 1894.

L. H. BROWN, *Clerk,*
By G. E. MADISON, *Deputy Clerk.*

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The execution of the foregoing writ of error appears from the schedule hereto annexed.

Supreme Court of California.

CONTRA COSTA.

DANIEL S. C. MCHARRY, *Respondent.* — CHAS. E. WILSON. WM. S. WELLS.

*v.*

JAMES STEWART, *Appellant.* — THEO. WAGNER. G. W. BOWIE.

*Entries on Register.*

| | | |
|---|---|---|
| 1892. | | |
| Sept. 27. | Filed Transcript, S. F. | 15 00 |
| Oct. 22. | Filed Appellant's Brief | |
| Nov. 12. | Filed Stip. and Order Resp. have to Dec. 10 to file brief | |
| Nov. 30. | Filed Resp. Brief | |
| Dec. 14. | Filed Stip. and Order allowing appellant to Jan'y 9th, 1893 to file reply brief | |
| 1893. | | |
| Jan. 9. | Filed Appellant's Reply to Respondent's Brf. | |
| Feb. 14. | Filed Stip. to submit upon briefs on file | |
| Sept. 27. | Assigned to Dept. 1 and submitted | |
| Dec. 30. | The judgment appealed from is affirmed (Commissioners). Paterson, J., Concurring Opinion Harrison, J., Garoutte, J | |
| 1894. | | |
| Jan. 16. | Filed Petition for Rehearing in Banc, S. F. | 5 00 |
| Jan. 30. | Rehearing denied January 29th, 1894. By the Court. B | |
| Jan. 30, 1894. | Remittitur to County Clerk, Jan. 30, 1894 | |
| Feb. 19. | Filed Petition for Writ of Error, S. F | 50 |
| Feb. 19. | Filed Order allowing Writ of Error, S. F | 50 |
| Feb. 19. | Filed Writ of Error, S. F. | 50 |
| Feb. 19. | Filed Order fixing amount of Bond, S. F | 50 |
| Feb. 19. | Filed Bond ($500) | 50 |
| Mar. 8. | Filed Supersedeas Bond. | |
| Mar. 17. | Filed Citation and admission of service | |

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In the Supreme Court of the State of California.

*Transcript on Appeal.*

In the Superior Court of the County of Contra Costa, State of California.

DANIEL S. C. MCHARRY,
*Plaintiff and Respondent,*

*v.*

JAMES STEWART,
*Defendant and Appellant.*

*Complaint.*

The plaintiff complains and alleges:

I.

That on the 26th day of February, A. D. 1891, the plaintiff was and now is the owner and seized in fee and entitled to the possession of all those certain lots, pieces and parcels of land situate, lying and being in the County of Contra Costa, State of California, and particularly described as follows, to wit: Lots numbered Two (2) and Three (3), respectively, of Section Number Twenty-two (22) and Lot numbered One (1) and the northeast quarter of the northeast quarter of Section Twenty-seven (27), in Township Number Two (2) North of Range Number Three (3) West, Mount Diablo Base and Meridian, according to the official survey of the Government of the United States.

II.

That while the plaintiff was such owner and so seized and entitled to the possession of said land and premises, the said defendant did on said 26th day of February, 1891, without right or title, enter into and upon said land and premises, and oust and eject plaintiff therefrom, and ever since said day has withheld and still unlawfully withholds the possession thereof from the plaintiff to plaintiff's damage in the sum of One Thousand Dollars.

III.

That the value of the rents, issues and profits of said premises from the said 26th day of February, 1891, and while the plaintiff has been excluded therefrom by the defendant, is Fifty Dollars.

Wherefore, plaintiff prays judgment against said defendant.

1st. For the recovery of the possession of said land and premises, and for the sum of One Thousand Dollars, damages for withholding the possession thereof.

2nd. For the sum of Fifty Dollars, the value of said rents, issues and profits, and for costs of suit.

3d. For such other or further relief as to the Court may seem meet and proper.

CHAS. E. WILSON,
WM. S. WELLS,
*Attorneys for Plaintiff.*

STATE OF CALIFORNIA,
*County of Contra Costa, ss:*

DANIEL S. C. MCHARRY, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

DANIEL S. C. MCHARRY.

Subscribed and sworn to before me this 29th day of June, 1891.

[SEAL.] WM. S. WELLS,
*Notary Public.*

[Endorsed:] Filed July 1, 1891. F. L. GLASS, *Clerk.*
By ELMER G. COX, *Deputy Clerk.*

[Title of Court and Cause.]

*Amended Answer and Cross-Complaint.*

Defendant for an amended answer to the complaint of plaintiff herein, denies generally and specifically each and every allegation therein contained, except that the defendant admits that he is and has been and still is in possession of said property in said complaint described, and claims that he is the owner of and entitled to the possession of the same. And defendant denies that by reason of his possession thereof the plaintiff has been damaged in the sum of One Thousand Dollars, or any other sum, or any sum at all.

And for an amended cross-complaint, the said James Stewart, defendant herein, complains of said plaintiff, Daniel S. C. McHarry, and alleges:

That on the 2nd day of October, 1882, he became the owner, and went into the actual possession of a tract of land situate in the County of Contra Costa, in the State of California, described as follows, to wit: "The Southeast Quarter of the Southwest Quarter " and fraction in the Southwest Quarter of the Southeast Quarter of " Section 22, in Township Two North, Range Three West, M. D. M., " being a portion of the land which was awarded to James McClel- " lan under partition of the Pinole Rancho, as the said Rancho was " surveyed and patented by the United States, and being the same " which Getta Stewart acquired from her former husband, James " McClellan."

That the said tract of land was conveyed to this cross-complainant by deed duly executed and acknowledged by said Getta Stewart, a copy of which deed is hereto attached, marked "Exhibit A." That said tract of land contained about sixty acres.

That in the month of March, A. D. 1876, this cross-complainant went into actual possession of certain public lands of the United States, situate, lying and being in the County of Contra Costa, and State of California, described as follows, to wit: Lots Two and Three of Section Twenty-two, and Lot One of Section Twenty-seven in Township Two North and of Range Three West, M. D. M., containing, according to public surveys, seventy and twenty-five hundredths (70.25) acres, and that he has since said date remained in the actual possession thereof, and has used and cultivated the same during all that time. That said public land adjoined the land conveyed to this cross-complainant by said Getta Stewart.

That said public land was reserved from settlement under United States laws on account of unsettled Spanish and Mexican Land Grants until the 16th day of April, A. D. 1883, when the boundaries of the Rancho el Sobrante were finally settled.

That on the 10th day of December, A. D. 1883, the survey of said public land was finally approved by the United States Surveyor General for California, and the map of said Township was filed in the United States Land Office at San Francisco, California, upon said day.

That this cross-complainant in the month of March, A. D. 1876, and since then and on the 16th day of April, A. D. 1883, and since then and on the 10th day of December, A. D. 1883, and thereafter, resided upon the land acquired by him by deed from Getta Stewart,

and was residing thereon on the said 10th day of December, A. D. 1883. That the cross-complainant on the said 10th day of December, A. D. 1883, and ever since the month of March, A. D. 1876, was the head of a family and was then of the age of forty-nine years, and was then and on the dates herein mentioned a naturalized citizen of the United States. This the cross-complainant on the said 2nd day of October, A. D. 1882, and thereafter on the said 10th day of December, A. D. 1883, and since then was the owner of, and was then and is now in the actual and peaceable possession of the land conveyed to him as hereinbefore stated, by said Getta Stewart.

That on the 10th day of December, 1883, this cross-complainant appeared in person at the United States Land Office at San Francisco, State of California, and duly applied to the Register of said office to enter an adjoining farm homestead under the provisions of Section 2289 and 2290 of the Revised Statutes of the United States, the said public land in his possession.

That in compliance with the said Section 2289 and 2290 of the Revised Statutes of the United States, this cross-complainant on said 10th day of December, 1883, made affidavit before the Register of the said United States Land Office at San Francisco, State of California, that he was then the head of a family and of the age of fifty-six years, and that he was a naturalized citizen of the United States, and that said application was for his exclusive use and benefit, and that the said entry of said land was made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person, and that said land was not mineral land, and that he was the owner of adjoining land upon which he was then residing, and that the amount of land applied for would not, with the land already owned by him, exceed in the aggregate one hundred and sixty acres.

That cross-complainant paid the fees and commissions required by law and demanded by said Land Officers, amounting to the sum of eight dollars, and that thereupon he was permitted to enter said land as an adjoining farm homestead, and that the Receiver of said Land Office issued to him a receipt, a copy of which is hereto annexed, marked "Exhibit B."

This cross-complainant further complains and alleges:

That on the 13th day of December, A. D. 1883, one D. S. C. McHarry, the plaintiff herein, filed a pre-emption declaratory statement in the said United States Land Office at San Francisco, alleging settlement on the 19th day of January, A. D. 1876, upon a tract of land described as follows, to wit: Lots Two and Three of Section Twenty-two, the Northwest quarter of the Northwest quarter of Section Twenty-six, and Lot One and the Northeast quarter of the Northeast quarter of Section Twenty-seven in Township Two North, Range Three West, M. D. M., and giving notice that he claimed a pre-emption right to said land. That the land described in said pre-emption declaratory statement filed by said D. S. C. McHarry, plaintiff, included the land in the actual possession of and entered by said cross-complainant, as an adjoining farm homestead.

That said plaintiff, D. S. C. McHarry, did not then nor has he

since then ever had possession of the land included in the cross-complainant's said homestead entry, or any part thereof.

Cross-complainent further complains and alleges:

That a hearing was had before the Register and Receiver of the United States Land Office at San Francisco, and that this cross-complainant, and plaintiff D. S. C. McHarry, produced witnesses in support of their respective claims to said land, whose testimony was taken and reduced to writing in said Land Office. That at the hearing of said contest in the said United States Land Office before said Register and Receiver, the fact was proved that this cross-complainant had been in the actual, peaceable and continuous possession of the land included in his said homestead entry since the month of March, A. D. 1876. That at said hearing the fact was proved that Getta Stewart, wife of this cross-complainant, was in the actual possession of the land conveyed to this cross-complainant by the deed, a copy of which is hereto attached, marked "Exhibit A," and had been in the actual possession thereof since the year 1871 to the date of said conveyance, and that with the said deed she delivered possession thereof to said cross-complainant, and that said cross-complainant then took possession and continued in the actual possession thereof with his family, consisting of his wife, said Getta Stewart, and her children by her former marriage, on the 10th day of December, A. D. 1883; and that the said facts thus proven were not disputed, and that no evidence whatever to put said facts so proven in issue was ever brought before said Land Officers at said hearing; that the said Register and Receiver refused to and did not consider said evidence and facts so proven, and made no finding thereon, but ruled that this cross-complainant claimed ownership of the land conveyed to him by Getta Stewart, by virtue of a deed from his wife, and that said cross-complainant acquired no right or title by his purchase from his wife to the land adjoining the land embraced in his homestead entry.

Cross-complainant further alleges that at the hearing of said contest before said Register and Receiver, the fact was proven that the plaintiff and members of his family threatened the life of this cross-complainant and attacked him at various times since he took possession of said lands, shot at him at the house in which he and his family resided, and thus put this cross-complainant in reasonable fear of his life and of personal violence of himself and family, and thereby compelled him to remove to the town of Martinez, and that thereafter this cross-complainant employed tenants who held actual possession of said land for him and that said tenants were assaulted by said plaintiff in a similar manner, and that upon two occasions said plaintiff and members of his family were arrested for such assaults. That said Register and Receiver refused to find facts from such testimony, but decided that it was unnecessary to consider the same. That the fact was proven before said Register and Receiver at said hearing that that portion of the land described in plaintiff's complaint included in this cross-complainant's homestead entry had been and was then in the actual possession of said cross-complainant and was not then and never had been in the possession of the plaintiff, and had been and was then included in the enclosure with the

land conveyed to this cross-complainant by Getta Stewart. That said plaintiff claimed to have made a settlement upon adjoining subdivisions of land and by reason of such settlement included the land in the possession of, and included in the homestead entry of the cross-complainant, in his said pre-emption claim, and the said Register and Receiver found such facts to be true, and nevertheless decided that the land included in this cross-complainant's homestead entry was not a valid adverse claim to the said pre-emption claim of the plaintiff for the reason that this cross-complainant did not acquire any right or title by said deed from his wife to the land adjoining the land embraced in his homestead entry.

Cross-complainant further alleges that said Register and Receiver, in thus deciding, misapplied the law and the facts, and that they had no jurisdiction to inquire into and decide upon the title of cross-complainant to the land conveyed to him by Getta Stewart.

That on the 7th day of March, A. D. 1885, the said land officers made and entered a decision in the matter of the conflicting claims of the cross-complainant and plaintiff, D. S. C. McHarry, to said land, a copy of which is hereto annexed, marked "Exhibit C."

That within the time required by and in accordance with the Rules and Regulations of the General Land Office of the United States, to wit: on the 10th day of March, A. D. 1885, the said cross-complainant, James Stewart, filed his appeal from said decision of said Register and Receiver to the Honorable Commissioner of the said General Land Office.

That the said matter was thereupon referred to said Commissioner of the General Land Office, who considered the same and reviewed the evidence and found new facts from the evidence taken before said Register and Receiver and not considered by them, and reviewed the action and decision of the said Register and Receiver, and thereupon, on the 1st day of September, A. D. 1886, duly rendered a decision in said matter reversing the decision of said Register and Receiver, and awarding to the cross-complainant herein the land claimed by him and included in his said homestead entry, a copy of which decision is hereto annexed, marked "Exhibit D."

That thereupon on the 6th day of November, A. D. 1886, the said plaintiff, D. S. C. McHarry, appealed from the said decision of said Commissioner of the General Land Office in said contest to the Honorable Secretary of the Interior.

That the said matter was thereupon referred to said Secretary of the Interior, who considered the same and reviewed the said evidence and found facts therefrom and considered evidence which said Receiver and Register had failed and refused to consider, and reviewed the actions and decisions of the said Register and Receiver and the said Commissioner of the General Land Office.

Cross-complainant further alleges that the fact was proven at said hearing before said Register and Receiver that the subdivisions of land described in plaintiff's complaint included in the cross-complainant's homestead entry, had been continuously since 1876 and were then in the actual possession of said cross-complainant, and was not then and never had been in the possession of the plaintiff, which was found by said Secretary from such evidence to be true.

Cross-complainant further alleges that the fact was proven at said hearing before said Register and Receiver that the said plaintiff claimed to have made his settlement upon subdivisions of land adjoining the land included in cross-complainant's homestead entry, and by reason of such settlement included in his pre-emption claim the land in the actual possession of this cross-complainant and included in his homestead entry, and said Secretary found said facts to be true from said evidence and nevertheless decided that the said actual possession by this cross-complainant and the want of possession of said land by said plaintiff did not prevent the said plaintiff's constructive possession and rights under his said pre-emption claim extending over the entire tract, and that said Secretary misapplied and misconstrued the law in reaching said conclusion.

Cross-complainant further alleges that at said hearing before said Register and Receiver, the following facts were proven:

First. That in the year 1865 one James McClellan acquired an undivided interest in a private land grant known as the Pinole Ranch and soon thereafter went into possession of a tract of land which contained about two hundred and fifty acres and including the land entered by cross-complainant as said adjoining farm homestead.

Second. That the official boundaries of said Pinole Rancho were not then determined; that the said boundaries were finally settled by the issue of a U. S. patent for said Pinole Rancho on the 22nd day of August, A. D. 1868, that the land included in the homestead entry of the cross-complainant was excluded from said Pinole Rancho by said patent, but was thereafter claimed as a part of the Rancho El Sobrante, but was excluded therefrom by the patent issued for said Rancho on the 11th day of August, A. D. 1883, and was thereafter surveyed as public land of the United States, and the plat thereof filed in the United States Land Office at San Francisco, California, on the 10th day of December, 1883.

Third. That said James McClellan, in 1869, married one Getta, now the wife of this cross-complainant.

Fourth. That after such marriage the said James McClellan in lieu of the undivided and inchoate interest theretofore owned by him in said Pinole Rancho, acquired a title by partition to such portion of the land in his possession as was within the patented boundaries of the said Pinole Rancho, but in addition thereto continued to hold possession of the land now included in cross-complainant's homestead entry, until December 22nd, 1871, when he died.

Fifth. That said James McClellan left surviving him a widow and two minor children, issue of such marriage.

Sixth. That said widow thereafter continued in possession of said land.

Seventh. That in the month of March, 1876, said widow married this cross-complainant.

Eighth. That since the month of March, 1876, this cross-complainant has been in the actual possession of the land now included in his said homestead entry, and that on the 2d day of October, 1882, he went into possession of an adjoining tract of land containing about sixty acres, which was conveyed to him by his said wife,

Getta Stewart, by the deed, a copy of which is hereto attached, marked "Exhibit A."

Ninth. That said land so conveyed to this cross-complainant adjoined the land included in his said homestead entry.

Tenth. That thereafter said cross-complainant and his family, consisting of his wife and her children by a former marriage, continued to reside upon said tract of land so conveyed to him by said Getta Stewart, and that they were residing thereon on the 10th day of December, 1883

Eleventh. That at said hearing before said Register and Receiver the plaintiff in this action introduced in evidence a certified copy of the order of the Probate Court of Contra Costa County, California, setting apart the said land which said James McClellan owned and occupied with his family as a Probate Homestead, a copy of which order is hereto attached, marked "Exhibit F."

Twelfth. That the said cross-complainant thereafter continued to cultivate the land included in his said homestead entry in connection with said adjoining land conveyed to him by his said wife, either by himself or tenants, to the day of said hearing in said Land Office.

Thirteenth. That during the time said land was cultivated by said cross-complainant through tenants, the house forming his residence upon the tract conveyed to him by his said wife, was specially reserved to himself and family and was occupied by him and his family at short intervals, and that said cross-complainant furnished the seed to sow said land and received a share of the crops produced upon said land as his rent from said tenants during said time.

Fourteenth. That the land included in this cross-complainant's homestead entry was enclosed in a good and substantial fence, together with the land conveyed to him by his said wife.

Fifteenth. That the plaintiff in this action and members of his family ever since the marriage of the cross-complainant to his said wife showed enmity and ill-will towards said cross-complainant and his family, and on several occasions threatened the life of this cross-complainant and assaulted him at various times and shot at him and at the house in which he and his family resided upon the land conveyed to him by the said Getta Stewart.

Sixteenth. That said assaults were committed by said plaintiff and members of his family for the purpose of driving said cross-complainant from said premises.

Seventeenth. That said assaults and acts of violence by said plaintiff inspired said cross complainant with reasonable fear of his life and fear of great bodily harm to his family and induced him to remove with his family temporarily to Martinez.

Eighteenth. That after such removal said cross-complainant maintained possession of said premises by tenants who cultivated the land for him for a share of the crops raised thereon, and that the said plaintiff in this action and members of his family acting for him committed similar acts of violence towards said tenants, and upon two occasions some of them were arrested therefor upon complaint of said tenants.

Nineteenth. That prior to the alleged settlement of plaintiff, his

father had a large tract of public land in his possession, of which the portion included in plaintiff's pre-emption claim, not in the possession of the cross-complainant, was a part.

Twentieth. That at the time of said alleged pre-emption settlement of the plaintiff, January 19, 1878, he had but recently reached the age of twenty-one years, and had resided with his said father prior and up to said time.

Cross-complainant further alleges that at said hearing before said Register and Receiver, said plaintiff produced testimony proving his residence upon and cultivation of that portion of said land included in his pre-emption claim not included in cross-complainant's homestead entry.

Cross-complainant further alleges that on the 16th day of September, A. D. 1889, said Secretary rendered a decision in said matter reversing the decision of said Commissioner of the General Land Office, and awarding said public land claimed by the said cross-complainant to plaintiff, D. S. C. McHarry, a copy of which decision is hereto annexed, marked "Exhibit E."

That from the testimony above stated the said Secretary upon appeal of the case to him, found the facts stated in his said decision "Exhibit E," and applied said facts so found, and reached conclusions of law stated in said decision.

Cross-complainant further alleges that there was no evidence before said Secretary which would warrant findings of fact or conclusions of law. "That the deed from Getta Stewart to this cross-complainant does not convey an estate in the land embraced therein, as will sustain an Adjoining Farm Entry, and that the widow where there are minor children, cannot make a conveyance of her interest in a Probate Homestead under the laws of California, which can take effect and be enforced by the grantee as tenant in common of the minor children, at least so long as the premises are impressed with the character of a homestead and are needed for the use of the family, and that the widow cannot take an interest as heir in the land set apart as a Probate Homestead because the homestead estate leaves nothing to which such interest may attach." That said Secretary had no jurisdiction over the said subject-matter and misapplied the facts and the law in reaching said conclusions.

Cross-complainant further alleges that there was no evidence before said Secretary which would warrant the finding that said cross-complainant only acquired an undivided interest in the land conveyed to him by Getta Stewart, and that said Secretary had no jurisdiction over the said subject-matter.

Cross-complainant further alleges that in said contest the said Secretary decided as a matter of law that an undivided interest in land coupled with residence thereon will not sustain an Adjoining Farm Entry under the Homestead Laws of the United States, and that said Secretary misapplied the law in reaching said conclusion.

Cross-complainant further alleges that said Secretary decided that the Homestead Laws in Adjoining Farm Entries required five years residence upon the original farm, and that said Secretary misapplied and misconstrued the law in reaching said conclusion.

Cross-complainant further alleges that the said Register and Receiver and said Secretary of the Interior were imposed upon and misled by the plaintiff's false testimony regarding the settlement and cultivation claimed to have been made by said plaintiff upon the land included in his said Pre-emption Claim, that said plaintiff in fact had made no bona fide settlement thereon, and had established no actual residence thereon.

Cross-complainant further alleges that on the 26th day of February, A. D., 1891, a patent was issued to said plaintiff, D. S. C. McHarry for the land claimed by him under his said pre-emption declaratory statement and entry thereunder.

That said patent conveys to said plaintiff, D. S. C. McHarry, the land in the possession of this cross-complainant, which he entered as an Adjoining Farm Homestead.

That the cross-complainant has, from the 2d day of October, A. D. 1882, and from the 16th day of April, A. D., 1883, and on and from the 10th day of December, A. D. 1883, continuously maintained his residence upon his original farm, which was conveyed to him by said Getta Stewart, and has maintained actual possession thereof, together with the said public land embraced in his said homestead entry, and has cultivated the same together with the said public land embraced in his said homestead entry for more than five years immediately succeeding the time of filing his said homestead affidavit in said Land Office, and that he has not alienated any portion of said land, and that he has at all times been ready since the expiration of said five years to pay any further fee and commissions required by the Homestead Laws, but has been prevented from doing so by the act of said Register and Receiver and the said Secretary of the Interior, and by reason of the said contest, and for the reason that his said homestead entry was canceled by order of the said Secretary of the Interior.

Cross-complainant further complains and alleges: That by reason of the said mistakes of fact and of law by said Register and Receiver and by said Secretary of the Interior hereinbefore stated, and by reason of the imposition practiced by plaintiff upon said Register and Receiver and Secretary of the Interior, a patent was erroneously and wrongfully issued to the plaintiff, D. S. C. McHarry, for the land in the possession of the cross-complainant and included in his said homestead entry.

Wherefore the cross-complainant prays for judgment:

First. That his said homestead entry for the benefit of his Adjoining Farm was duly and legally made.

Second. That this cross-complainant was duly qualified to make said entry and was an owner of adjoining land and had a legal residence thereon at the time of and since making said homestead entry, within the true intent and meaning of Section 2289 of the Revised Statutes of the United States.

Third. That this cross-complainant has complied with all the requirements of said Homestead laws, and has thereby acquired a vested right to said land included and described in his said homestead entry, and is entitled to a patent therefor from the United States.

Fourth. That the pre-emption entry of said plaintiff, D. S. C. McHarry, and the patent issued thereon, for and including the land embraced in the cross complainant's entry, was allowed, issued and obtained wrongfully, by fraud, imposition and by mistake, and is void and of no effect as against said cross-complainant, and to the extent as it conflicts with the said homestead entry of the cross-complainant.

Fifth. That the plaintiff holds the legal title conveyed by said patent to the land in the possession of the cross-complainant and included in his said homestead entry, to wit: of Lots Two and Three of Section Twenty-seven, in Township Two North, and of Range Three West, M. D. M., as a Trustee for the benefit of said cross-complainant, and that said plaintiff is required to convey the same to this cross-complainant, and that said plaintiff be forever enjoined from asserting any right, title or interest therein under said patent.

Sixth. Cross-complainant prays judgment for One Thousand Dollars damages, and for such other and further relief to which he may be lawfully entitled in the premises, and for judgment for his costs expended in this action.

THEO. WAGNER and
G. W. BOWIE,
*Attorneys for Defendant.*

STATE OF CALIFORNIA,
*County of Contra Costa, ss:*

James Stewart being duly sworn deposes and says: That he is the defendant and cross-complainant in the above-entitled action, and that he has read the foregoing Amended Answer and Cross-complaint and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

JAMES STEWART.

Subscribed and sworn to before me this 16th day of December, A. D. 1891.

F. L. GLASS,
*County Clerk.*

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*"Exhibit A" to Cross-Complaint.*

I, Getta Stewart, of the County of Contra Costa, State of California, for and in consideration of Five Dollars, the receipt whereof is hereby acknowledged, and other good and valuable considerations, do grant to James Stewart, of the said County and State, all that real property situate in Contra Costa County, State of California, bounded and described as follows: The southeast quarter of the southwest quarter and fraction in the southwest quarter of the southeast quarter of Section Twenty-two, in Township 2 North, Range 3 West, being a portion of the land which was awarded to James McClellan, under partition of the Pinole Rancho, as the said Rancho was surveyed and patented by the United States.

The premises hereby conveyed being the same which the grantor

herein acquired from her late husband, James McClellan aforesaid.

Witness my hand this second day of October, A. D. 1882.

GETTA STEWART.

Signed and executed in the presence of
W. C. WINCKLER,
J. K. CARTER.

STATE OF CALIFORNIA,
*City and County of San Francisco, ss:*

On this second day of October, A. D. One Thousand Eight Hundred and Eighty-two, before John K. Carter, a Notary Public, in and for the said City and County, residing therein, duly commissioned and sworn, personally appeared Getta Stewart, known to me to be the person described in, whose name is subscribed to and who executed the annexed instrument, described as a married woman; and upon an examination without the hearing of her husband, I made her acquainted with the contents of the said instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] J. K. CARTER,
*Notary Public.*

[Endorsed:] Getta Stewart to James Stewart. Deed. Dated October 2d, 1882. Recorded at the request of T. Wagner, October 19, A. D. 1883, at 10 minutes past 9 A. M., in Vol. 45 of Deeds, page 131, Records Contra Costa County.

C. S. COUSINS,
*County Recorder.*

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*"Exhibit B" to Cross-Complaint.*

Receiver's Duplicate Receipt, No. 5734. Application No. 5734. Homestead.

RECEIVER'S OFFICE, SAN FRANCISCO, Cal., December 10, 1883.

Received of James Stewart the sum of eight dollars —— cents, being the amount of fee and compensation of Register and Receiver for the entry of Lots 2 and 3 of Sec. 22 and Lot 1, Sec. 27, in Township 2 N., of Range 3 W., M. D. M., under Section 2290, Revised Statutes of the United States, 70.25 acres.

CHAS. H. CHAMBERLAIN,
$8.00 *Receiver.*

[Endorsed across margin.] Final entry must be made hereon on or before Dec. 8, 1890.

[Endorsed across face:] Adjoining Farm.

*"Exhibit C" to Cross-Complaint.*

Decision of Register and Receiver.

U. S. LAND OFFICE, SAN FRANCISCO, CAL., March 7, 1885.

D. S. C. MCHARRY,

*v.*

SAM'L KELLY and JAMES STEWART.

The records of this office show: that Daniel S. C. McHarry filed D. S. No. 17834, Dec. 13, 1883, alleging settlement Jan. 19, 1878, for Lots 2 and 3, Sec. 22, N. W. ¼ of N. W. ¼ Sec. 26, and Lot L and N. E ¼ of N. E. ¼ Sec. 27, T. 2 N., R. 3 W., M. D. M.

Samuel Kelly made H. E. 5725, Dec. 10, 1883, upon N. W. ¼ Sec. 26, T. 2 N., R. 3 W., M D. M.

James Stewart made H. E. 5734 (Adjoining Farm), Dec. 10, 1883, upon Lots 2 and 3, Sec. 22, and Lot 1 of Sec. 27, said Township.

Township plat filed Dec. 10, 1883.

McHarry, in the case of Sam'l Kelly *v.* Sarah Harding and D. S. C. McHarry, abandoned the land in contest between him and Kelly, and thus the contest in this case is only between McHarry and Stewart.

The testimony shows that the land in contest has been in the possession of Mrs. Stewart and her husband, the contestant; that McHarry settled on the land outside of the possession of Stewart, and has made sufficient residence, improvements and cultivation.

Stewart claims ownership of the adjoining land, on which his adjoining farm entry is based, by virtue of a deed from his wife therefor.

Said tract is part of the Pinole Grant and was part of the estate of McClellan, Mrs. Stewart's former husband, and was set apart as a homestead by the Probate Court for the support of McClellan's family.

There is a large amount of testimony in relation to Stewart's residence and the trouble between Stewart and the McHarry family, but it is unnecessary to consider it, since the Supreme Court of this State has, in Bank, decided:

"That the right to a Probate Homestead is not subject of sale and is not an estate, either at law or in equity." (*See Cal. Rep.*, Vol. 57, P. 437.)

Stewart, therefore, acquired no right or title by his purchase from his wife of the land adjoining the land embraced in his homestead entry, and his claim to the latter, therefore, must be rejected, and in the absence of any valid adverse claim, the land must be awarded to McHarry.

CHAS. H. CHAMBERLAIN,
*Receiver.*

WM. R. WHEATON,
*Register.*

*"Exhibit D" to Cross-Complaint.*

Decision of Commissioner of the General Land Office.

"G" DEPARTMENT OF THE INTERIOR, B. F. C.
GENERAL LAND OFFICE, H. O. B.
WASHINGTON, D. C. R. A.
Sept. 1st., 1886.

*Register and Receiver, San Francisco, Cal.*

GENTLEMEN: I have considered the contested case of D. S. C. McHarry *v.* Samuel Kelly and James Stewart, involving Lots 2 and 3 of Sec. 22, N. W. ¼ of N. W. ¼ of Sec. 26, and Lot 1 and N. E. ¼ of N. E. ¼ of Sec. 27, Tp. 2 N., R. 3 W., M. D. M.

The records show that Daniel S. C. McHarry filed D. S. No. 17834, Dec. 13, 1883, alleging settlement, Jany. 19, 1878, for Lots 2 and 3, Sec. 22, N. W. ¼ of N. W. ¼ of Sec. 26, and Lot 1 and N. E. ¼ of N. E. ¼ of Sec. 27, Tp. 2 N., R. 3 W., M. D. M.

Samuel Kelly made H. E. 5725, Dec. 10, 1883, for N. W. ¼ of Sec. 26, same Tp. and Range.

James Stewart made H. E. 5734 (Adjoining Farm) Dec. 10, 1883, for Lots 2 and 3 of Sec. 22, and Lot 1 of Sec. 27, Tp. and Range aforesaid.

At Stewart's instance hearing was had, and you decided in favor of McHarry. Said McHarry in case of Kelly *v.* Harding and McHarry, abandoned the land in contest between him and Kelly, *i. e.*, the N. W. ¼ of N. W. ¼ of Sec. 26, Tp. and R. aforesaid, and the only parties to this contest, therefore, are Stewart and McHarry.

From your decision, awarding the land in controversy to McHarry, Stewart appeals.

The main point of contest in this case, and upon which contestee chiefly relies, is that the land which Stewart claims to own, his original farm, although in his (Stewart's) possession, is really not owned by him, and consequently he is not entitled to make an adjoining farm entry.

The testimony in the case established the following facts:

One James McClellan, first husband of the wife of the contestant, in the year 1865 or 6, owned either an inchoate or absolute interest in certain land ceded by the United States by private grant known as the Pinole Rancho (or Ranch).

In 1869 McClellan married, his wife being the present Mrs. Stewart, wife of contestant. In 1871 McClellan died, leaving his wife in possession of the land above referred to. Said land was subsequently set apart by order of the Court as a Probate Homestead for the benefit of Mrs. McClellan and her two children, issue of her marriage to McClellan.

Subsequently Mrs. McClellan married contestant herein, and conveyed to him by deed her interest in the land left by her former husband—the Probate Homestead.

It is shown with reference to the land in controversy, that said McClellan had possession of the same as early as 1865 or '66, and continued in such possession, cultivating and improving the land up

to the time of his death. After his death Mrs. McClellan continued in possession of said land until her marriage with Stewart.

Stewart thereupon assumed control of said land, and although McHarry and his relatives and confederates have threatened the life of Stewart, and attacked him at various times, shooting at him and the house in which he and his family lived, finally forcing him to abandon his property and remove to the Town of Martinez, some miles distant; it is shown that he has maintained constructive possession of the land in controversy up to the date of hearing. Stewart's tenants were similarly dealt with by the McHarrys, but resisted the attempts made to dispossess them by force and succeeded in retaining possession of the land.

The testimony shows that the McHarrys attempted to take forcible possession of the land in controversy, and the facts indicate a determination to do so at whatever cost.

It is safe to conclude that Stewart was in danger of his life, and the attempt of McHarry to show that Stewart had removed to and was living in the Town of Martinez at the time he made his entry, would prove impotent to defeat Stewart's right to enter if McHarry had succeeded in establishing that fact.

The only question that presents itself for consideration, therefore, is, did Mrs. Stewart's conveyance to her husband of her interest in the Probate Homestead, clothe him with such ownership in said land as would qualify him to make Adjoining Farm Entry under Sec. 2289, Revised Statutes?

To determine this fact it is necessary to consider the force of the instrument under the laws of the State of California, by which Mrs. Stewart attempted to convey to contestant her interest in the Probate Homestead. Your decision was based on this question, and you held in effect as follows:

"That the right to a probate homestead is not the subject of sale "and is not an estate either at law or in equity. (See *Cal. Rep't*, "Vol. 57, page 473.)

"Stewart, therefore, acquired no right or title by his purchase "from his wife of the land adjoining the land embraced in his home-"stead entry, and his claim to the latter, therefore, must be rejected, "and in the absence of any valid adverse claim, the land must be "awarded to McHarry."

Counsel for contestant insists in his argument that the rule laid down in the case referred to is mistakenly applied, and that there is a distinction between a Probate Homestead which has been set apart and *the right* to have such homestead set apart. I am of the opinion that the law recognizes such distinction and that you committed error in applying the ruling of the Supreme Court in the case mentioned, to this case.

The question whether the estate out of which the Probate Homestead was carved was community property, is argued at some length by counsel on both sides, counsel for contestant insisting that it was community property, and opposing counsel that it was separate property. I take it, however, that it is unimportant whether the estate was community or separate property.

Mrs. McClellan inherited an undivided moiety of the fee in rever-

sion, whether there was a community or separate estate. She was also entitled to an interest in the homestead as a member of the family, hence when she conveyed her entire interest to Stewart, it invested him with a complete title to an undivided moiety, which enabled him to make an Adjoining Farm Entry, under ruling in Douglass Dunmett (2 Copp, 181).

Your decision is therefore reversed, the D. S. of McHarry held for cancellation as to the land in controversy, and the same is hereby awarded to Stewart, subject to his making proper compliance with the law.

Notify the parties, and allow the usual time for appeal.

Respectfully,

(Signed.) S. M. STOCKSLAGER,
*Acting Commissioner.*

SAN FRANCISCO, May 28, 1891.

I hereby certify that the foregoing is a full, true and correct copy of Commissioner's letter "G" of Sept. 1st, 1886, this day exhibited to me, and now on file in this office together with the endorsement thereon.

JOHN F. SHEEHAN,
*Register.*

[Endorsed:] General Land Office, Sept. 1, 1886. D. S. C. McHarry *v.* Samuel Kelly, James Stewart.

Service of notice of the within admitted this 8th day of September, 1886.

THEO. WAGNER,
*Attorney for Stewart.*

Hyde for McHarry notified Sept. 10, 1886. Ans January 15, 1886. Filed Sept. 7, 1886.

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*"Exhibit E" to Cross-Complaint.*

Decision of Secretary of the Interior.

DEPARTMENT OF THE INTERIOR, WASHNGTON, D. C., Sept. 16, 1889.
Vol. 8—329.

D. S. C. MCHARRY
*v.*
JAMES STEWART. } Adjoining Farm Homestead.

The Commissioner of the General Land Office, Sir:—

This is an appeal by D. S. C. McHarry from the decision of your Office of Sept. 1, 1886, in the case of D. S. C. McHarry *v.* James Stewart, involving Lots 2 and 3, Sec. 22, and Lot 1, Sec. 27, T. 2 N., R. 3 W., M. D. M., San Francisco District, California.

Stewart made Adjoining Farm Homestead Entry, No. 5734, for said land, Dec. 10, 1883, and McHarry filed pre-emption declaratory statement No. 17,834, for a tract embracing said land and other lands, Dec. 13 of said year, alleging settlement January 19, 1878. McHarry, after due notice by publication, offered proof in support of his pre-emption filing, May 9, 1884, at which time Stewart appeared as contestant, and a number of witnesses were examined and a large amount of testimony taken on both sides. The decision of the local Officers was adverse to Stewart on the ground substan-

tially that he did not own the land, upon which as a basis he claimed his right to make said Adjoining Farm Entry. On appeal by Stewart, your Office (in the decision from which McHarry now appeals to this Department) reversed the decision of the local Officers on said point and awarded the land to Stewart.

The land claimed by Stewart as a basis for his entry is the S. E. ¼ of S. W. ¼ and a fraction in the S. W. ¼ of the S. E. ¼ of Sec. 22 in said T. 2 N., R. 3 W., (about sixty acres in quantity), and is portion of a tract of one hundred and seventy-five (175) acres, which, as a part of the estate of James McClellan, deceased, had been, February 19, 1876, duly set apart by decree of the Probate Court of Contra Costa county, California, (in which it was situated) as a "Probate Homestead" under the laws of California, for "the use of" the family of said deceased. The family consisted of the widow and two minor children, a girl and boy, aged respectively at date of said decree (February 19, 1876), four and five years. The widow subsequently married Stewart, and he claims the ownership of said sixty acres, under a deed from her therefor, executed October, 2, 1882.

There are two classes of homesteads provided for by the statutes of California, namely: Homesteads selected and recorded during the lifetime of the deceased, and, where this has not been done, homesteads selected and set apart by the Judge of the Court of Probate, "for the use of" the surviving husband or wife and minor children, if there be any. The homestead now under consideration belongs to the latter class as "Probate Homesteads."

Homesteads are to be set apart and the interests of the parties entitled thereto determined in pursuance of the statutes in force at the time when the order is made (*Sultzberger* v. *Sultzberger*, 50 Cal., 387).

In this case the order was made as stated above, Feb. 19th, 1876, and at that time the statutes in force on this subject were Section 11,465, et seq., Vol. 2, "*Codes and Statutes* of California," 1876, and Section 6,237, et seq., Vol. 1, of said "*Codes and Statutes*." Under these laws a material distinction is made between the two kinds of homesteads; it being provided by Section 11,474 (*Codes and Statutes*), as to a homestead selected and recorded during the lifetime of the decedent, that if selected from the community property, it vest on the death of the husband or wife, absolutely in the survivor, but if from the separate property of either husband or wife, it vests, on the death of the person from whose property selected, in his or her heirs, "subject to the power of the Probate Court to assign it for limited period to the family of the decedent;" while in the course of a "Probate Homestead" it is held, that under Section 11,-468 (*Ib*), a homestead set apart out of the separate estate of a deceased husband is the property of the surviving wife if there are no minor children, and, if the decedent left a minor child or children, *one-half* "*belongs to*" *the widow*, and the other half to the child or children in equal portions. (*Mawson* v. *Mawson*, 50 Cal., 539.)

The land set apart in this case, *it appears*, was not acquired by McClellan after marriage, but was owned by him before marriage, and this being the case, it was, under the California Statutes, his

separate property. (Secs. 5163 and 5164, *Codes and Statutes.*) There being minor children, one-half of it was, according to *Mawson* v. *Mawson, supra*, the property of the widow, and the other half belonged to the children in equal proportions.

Until partition is made, however, the widow owns no portion of the land in severalty, but holds an undivided half interest in the entire tract, as tenant in common with the children. Secs. 5685, 5686 and 5683, *Codes and Statutes.*

Mrs. Stewart, in the deed under which Stewart claims, does not undertake to convey her undivided half interest in the entire homestead (175) acres, but said deed purports to be an absolute conveyance by number of a particular portion (about 60 acres) of the homestead tract. This was undoubtedly done with a view of satisfying the requirements of the law, that the tract used as a basis for an adjoining farm entry should be "contiguous" to the land embraced in such entry. At the date of the deed, the minor children were aged respectively ten and eleven years, and they have not yet attained their majority. *Without intending to intimate an opinion* upon the question which presents itself at the outset, whether under a conveyance by one tenant in common of a particular part (described by number) of the common estate, any—and if so, what—interest passes to the grantee *as against* infant co-tenants, during the existence of their disability of minority, or until such conveyance is sanctioned by legal proceeding, in which such co-tenants are properly represented and their interests protected. (*Washburn*, Vol. 2, p. 261, and Vol. 1, p. 654; *Hilliard*, p. 593.) *I am of the opinion* that the deed in this case does not convey an estate in the land embraced therein, as will sustain an Adjoining Farm Entry, for the reason, in the first place, that the widow, where there are minor children, *cannot make a conveyance of her interest in a "Probate Homestead"* under the laws of California, which can take effect and be enforced by the grantee as tenant in common of the minor children, at least, so long as the premises are impressed with the character of a homestead and are needed for the use of the family. As to homesteads selected during the life of the decedent, it is provided by Section 6242 (*Codes and Statutes*) that they "cannot be conveyed or encumbered, unless the instrument be executed and acknowledged by both husband and wife." In the case of *Lies* v. *De Diablar*, (12 Cal., 328), a mortgage by husband alone of the homestead was sought to be enforced after his death, on the ground that by adultery and abandonment the wife had forfeited her rights, and the homestead had been divested of its character as such, but the mortgage was held to be void, and the Court say: "It is a mistake to suppose that this provision" (as to joint conveyance) "was solely for the benefit of the wife. It was as much for the benefit of the children." While there is no statutory inhibition of the conveyance by the widow of her interest in the "Probate Homestead," such conveyance is manifestly contrary to the policy of the law, and tends directly to defeat its object.

Section 11,465 (*Codes and Statutes*), the law in force when the homestead under consideration was set apart, provides, that if no homestead has been selected and set apart during the life of the

decedent, "the Judge or Court must select, designate, set apart, and cause to be recorded, a homestead *for the use of the persons* hereinbefore named * * *." The persons heretofore referred to are "the surviving husband or wife, and the minor children of the decedent." In the order or decree setting apart the homestead in this case, the widow and minor children are named as constituting *the family* of the decedent and it decreed, that the land "be and the same is hereby set apart for the use of *his family*." In the case of Estate of *Moore*, (57 Cal., 437), the Court say: That the homestead right "is a right bestowed by the beneficence of the law of this State" (California) "for the benefit of the family, and the homestead when set apart, is to be set apart for the benefit of the widow and children. Every minor has an interest, and has a right to be named in the decree. The property set apart is to be a home for them all, she, the widow, taking her place as the head of the family. It certainly could not be said that her deed conveying her interest as successor would interfere with and defeat *the purpose of the law in giving the family an abiding place.*" While in that case the question involved was as to the power of the widow to sell the homestead right or right to have a homestead set apart, yet the reason assigned by the Court, in the following quotation from the decision, for denying such right, applies with equal (if not greater) force to a sale of her interest in the homestead after it has been set apart:

"If one of the parties entitled to apply (say the mother of minor children) could sell her right, and her grantee apply, such grantee would be entitled to the possession of the homestead as against the mother, and would have a joint interest with the children, to the exclusion of the mother; which would be repugnant to the very idea of a homestead. It being the object of the Legislature to provide for a homestead, *i. e.*, a place of home for the family, we cannot hold that the statute enacted for that purpose shall have the construction and effect of destroying the object in view."

In the case of *Whittle* v. *Samuels*, 54 Ga., 548, cited in *Thompson on Homestead Exemption*, Sec. 551, it is held that a widow to whom a homestead exemption has been set apart under the laws of Georgia, cannot sell the same even with the approval of the Ordinary and consent of the Executor. "There appears," says Mr. Thompson, "to be no statute in that State inhibiting such sale; but the rule is placed on the ground that it is contrary to the policy of the law to permit it to be done; that statutes permitting sale of the homestead should be strictly construed; that the minor children have rights * * * which are endangered by such alienation."

The interest in the homestead tract given by the statute (Sec. 11,-468, *Codes and Statutes*), to the surviving husband or widow, or such survivor and the minor children, covers the entire estate therein, and, while the laws of California do not prevent the widow from taking as heir an interest in the remainder of the husband's property, left after the homestead has been set apart, she cannot (as held in your Office decision) take an interest as heir in the land so set apart, *because the homestead estate leaves nothing to which such interest may attach.*

But admitting that the deed of Mrs. Stewart conveys to Stewart an undivided interest in the land embraced therein, does such interest entitle him to make Adjoining Farm Entry? While the acting Commissioner in the case of *Douglass Emmett*, 2 C. L. O., 181, and the Commissioner in the case of *Thomas S. Wetherbee*, I. L. D., 38, held without discussion that an undivided interest in the land will sustain such entry, the question seems never to have been passed upon by this Department. The Statute (Sec. 2289, Rev. Stat.) authorizing Adjoining Farm Entries, provides that "every person owning and residing on land may, under the provisions of this Section, enter other land lying *contiguous* to his land which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres." Statutes are to be read "according to the natural and most obvious import of the language used without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." (*Waller* v. *Harris*, 20 Wend., 555; *Sedg. on Construction of Stat. and Con. Law*, 220.) "The natural and most obvious import" of the word "owning" is absolute and not qualified ownership, "the right by which a thing belongs to some one in particular to the exclusion of all others." (*Bouvier's Law Dic.*, Sec. 679; *Codes and Statutes of Cal.*) And not a right shared with one or more persons, or restricted in its use, or limited or deferred as to time of enjoyment. There is nothing in the contest or subject matter of the Statute authorizing a departure from the ordinary meaning of the language employed. On the contrary, an adherence to this meaning would seem to be essential to the enforcement of the law, both in its letter and spirit. Contiguity of the original farm to that entered, is an essential under the Statute of an Adjoining Farm Entry; if an undivided interest in land owned in common with others be held to sustain such entry, it cannot be known whether the portion of the common estate which will be allotted to the entryman on partition will in fact adjoin the land entered. A tract of one hundred and twenty acres might be owned in common by twelve persons, each having an undivided interest of one-twelfth, and all residing in one house or on one part of the tract, and, if an undivided interest is a sufficient basis for an adjoining farm entry, each of the twelve might (if a sufficient amount of land circumjacent to the land held in common could be found unappropriated) make entry of one hundred and fifty acres (1800 in all) and on partition of the tract held in common, the tract allotted might in no instance be contiguous to that entered by the allottee, and only one of them will have had actual *residence* on the tract constituting his original farm. A construction of the law which is not only a departure from the natural import of its language but leads to a violation of both its letter and spirit, is not to be indulged. In consonance with this view, the adjoining-farm-homestead entryman is required in his final affidavit to make oath that he is "the *sole bona fide* owner as an actual settler" of the land constituting his original farm. A party owning only an *undivided* interest in land is not the "sole owner" of any part thereof. I am of the opinion that an undivided interest in land will not sustain an adjoining farm entry, and, conceding that Stewart, by the deed from his wife, acquired

such interest in the land which he claims as an original farm, his entry would still be invalid.

There is still another fatal objection to Stewart's entry. The Statute requires *residence* on the original farm. The proof shows that Stewart and his family, while making a show of residence on the tract claimed as an original farm, had in fact leased said farm to a tenant for a number of years, covering the period of his adjoining farm entry, and that they in fact resided several miles from said farm in the town of Martinez, where Stewart had an established, permanent business and a residence connected with his place of business. The excuse set up by Stewart for such non-residence, namely, that it was because of danger of violence and injury at the hands of the McHarrys, is not sustained by the evidence. Mrs. Stewart hereof testifies, that she went to the farm and remained there for short periods, whenever she felt inclined, and seems never to have been molested, and no attempt by the McHarrys to prevent Stewart or his family from residing on the original farm at any time, is shown.

It further appears that Stewart owned another and distinct tract of two hundred and ninety acres of land, while under the pre-emption law the proprietorship of "three hundred and twenty acres of land in any State or Territory" disables a party from exercising the pre-emptive, there is laid down in the Homestead Law no disability to make Homestead Entry on account of ownership of other lands, except that in making adjoining-farm-homestead entry, it is provided that the land already "owned and occupied" as an original farm, shall not with that entered as an adjoining farm "exceed in the aggregate one hundred and sixty acres."

The entry of Stewart being invalid, it remains to consider the pre-emption claim of McHarry. The proof shows, as found by the local officers, that McHarry settled and established residence on a portion of the tract covered by his filing outside of that portion in contest between him and Stewart, claiming possession of the entire tract under his filing, and that he has reasonably complied with the law as to residence, improvements and cultivation. The possession by Stewart of a part of the tract covered by McHarry's filing being under his (Stewart's) *invalid* adjoining farm entry, did not prevent McHarry's constructive possession and rights under his filing extending over the entire tract. The pre-emption filing of McHarry will, therefore, be allowed to remain intact, subject to his further compliance with the law, and the entry of Stewart will be canceled.

The decision of your office is reversed, and the papers in the case are returned herewith.

Very Respectfully,

JOHN W. NOBLE,

*Secretary.*

Filed 3 Oct., 1889.

Department of the Interior.

U. S. LAND OFFICE, SAN FRANCISCO, CAL., 10 Oct., 1889.

I hereby certify that the above and foregoing is a true and correct copy of the letter now on file in this office.

A. C. BRADFORD,

*Register.*

*"Exhibit F" to Cross Complaint.*

In the Probate Court of the City and County of Contra Costa, State of California.

IN THE MATTER OF THE ESTATE OF JAMES MCCLELLAN, Deceased. } Decree Setting Apart Homestead for Use of Family.

Getta McClellan, widow of the deceased and Administratrix of the Estate of said deceased, having on the 19th day of February, A. D. 1876, made application to this Court by petition for an order setting apart for the use of the family of said deceased, the Homestead in said petition and hereinafter particularly described, together with the dwelling-house thereon and its appurtenances, and it duly appearing to said Court from the papers on file and other evidence:

That said deceased was a resident of the said County of Contra Costa at the time of his death and left estate, real and personal, in said County.

That Letters of Administration were duly issued to Getta McClellan, the widow, and that on the 15th day of May, A. D. 1872, said Administratrix duly returned an inventory and appraisement of said estate.

That the family of said deceased consists of Getta McClellan, the widow, and two minor children, viz: Mary Ann, aged five years, and James William, aged four years.

And that said applicant is the widow of the deceased, is entitled to have the said premises set apart to herself and children, a Homestead, and that the same does not exceed the sum of Five Thousand Dollars in value, viz: $3,500.

And no person making any opposition and no person appearing to oppose said petition, and it appearing by the provisions of Section 1481, of the Code, the homestead should be set apart to and for the family of deceased.

It is hereby ordered, adjudged and decreed: That all that certain lot, piece or parcel of land situate, lying and being in the said County of Contra Costa, State of California, and bounded and described as follows, to wit: being 175 acres of land situate in said County, being a portion of Division No. 5, of the Pinole Rancho, bounded on the north by the lands of James McHarry, on the east by the Sobrante Lands, on the south by the lands of John Harding, and on the west by the lands of Thomas Harrington and Barney Coyle, and marked B on the map of the partition of Division No. 5 of the Pinole Ranch, and being the same land set apart to the said James McClellan in said partition.

Together with the dwelling-house thereon and its appurtenances be and the same is hereby set apart for the use of the family of said James McClellan, deceased, hereinbefore named, and that the same shall not be subject to administration.

And it is further ordered that a certified copy of this Decree be duly recorded in the office of the County Recorder of said County of Contra Costa.

THOMAS A. BROWN,
*Probate Judge.*

Dated Feb. 18th, '76.

[Endorsed:] Copy acknowledged Dec. 18, 1891.

CHAS. E. WILSON,
WM. S. WELLS,
*Attorneys for Plaintiff.*

Filed December 18, 1891.

F. L. GLASS, *Clerk.*
By ELMER G. COX, *Deputy Clerk.*

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*Plaintiff's Notice of Motion to Strike Out Portions of Cross-Complaint.*

[Title of Court and Cause.]

Please take notice, that on Monday, the 4th day of January, 1892, at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, at the Court room of said Court, in the Court-house at Martinez, the plaintiff will move this Honorable Court for an order striking out of and from the Amended Cross-complaint of Defendant filed herein, the following allegations and matters in said Amended Cross-complaint contained, viz:

I.

From, and including the word "that" in line 6, page 5, to and including the word "entry" in line 3, page 6 of said cross-complaint, said allegations being in the words and figures following, to wit:

"That at the hearing of said contest in the said United States "Land Office, before said Register and Receiver, the fact was "proved that this cross-complainant had been in the actual, peaceable and continuous possession of the land included in his said "Homestead Entry, since the month of March, A. D. 1876. That "at said hearing the fact was proven that Getta Stewart, wife of "this cross-complainant, was in the actual possession of the land conveyed to this cross-complainant by the deed, a copy of which is "hereto attached, marked "Exhibit A," and had been in the actual "possession thereof since the year 1871 to the date of said conveyance, and that with the said deed she delivered possession thereof "to said cross-complainant, and that said cross-complainant then "took possession and continued in the actual possession thereof "and residing thereon with his family, consisting of his wife, said "Getta Stewart, and her children by her former marriage, on the "10th day of December, A. D. 1883; and that the said facts thus "proven were not disputed, and that no evidence whatever to put "said facts so proven in issue was ever brought before said Land "Officers at said hearing; that the said Register and Receiver "refused to and did not consider said evidence and facts so proven, "and made no findings thereon, but ruled that this cross-complainant "claimed ownership of the land conveyed to him by Getta Stewart "by virtue of a deed from his wife, and that said cross-complainant "acquired no right or title by his purchase from his wife, to the land "adjoining the land embraced in his Homestead Entry."

II.

From, and including the word "that" in line 4, page 6, to and including the word "assaults" in line 16, page 6, of said cross-complaint, said allegations being in the words and figures following to wit:

"That at the hearing of said contest before said Register and "Receiver, the fact was proven that plaintiff and members of his "family threatened the life of this cross-complainant and attacked "him at various times since he took possession of said lands, shot at "him and at the house at which he and his family resided, and thus "put this cross-complainant in reasonable fear of his life and of "personal violence of himself and family, and thereby compelled "him to remove to the Town of Martinez; and that thereafter this "cross-complainant employed tenants who held actual possession "of said land for him and that said tenants were assaulted by said "plaintiff in a similar manner, and upon two occasions said plaintiff "and members of his family were arrested for such assaults."

III.

From, and including the word "that" in line 16, page 6, to and including the word "same" in line 18, page 6, of said cross-complaint, said allegations being in the words and figures following, to wit:

"That said Register and Receiver refused to find facts from such "testimony, but decided that it was unnecessary to consider the "same."

IV.

From, and including the word "that" in line 18, page 6, to and including the word "Stewart" in line 25, page 6, of said cross-complaint, said allegations being in the words and figures following, to wit:

"That the fact was proven before said Register and Receiver at "said hearing that that portion of the land described in plaintiff's "complaint included in this cross-complainant's Homestead Entry "had been and was then in the actual possession of said cross-"complainant and was not then and never had been in the posses-"sion of the plaintiff, and had been and was then included in the "enclosure with the land conveyed to this cross-complainant by "Getta Stewart."

V.

From, and including the word "that" in line 25, page 6, to and including the word "claim" in line 1, page 7, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"That the said plaintiff claimed to have made a settlement upon "adjoining subdivisions of land, and by reason of such settlement "included the land in the possession of, and included in the Home-"stead Entry of this cross-complainant, in his said pre-emption "claim."

VI.

From, and including the word "cross-complainant" in line 8, page 7, to and including the word "Stewart" in line 12, page 7, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"Cross-complainant further alleges that said Register and Re-
"ceiver, in thus deciding, misapplied the law and the facts, and
"that they had no jurisdiction to inquire into and decide upon the
"title of cross-complainant to the land conveyed to him by Getta
"Stewart."

VII.

From, and including the word "that" in line 12, page 11, to and including the word "time" in line 19, page 11, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"That during the time said land was cultivated by said cross-
"complainant through tenants, the house forming his residence
"upon the tract conveyed to him by his said wife was specially
"reserved to himself and family and was occupied by him and his
"family at short intervals, and that the said cross-complainant
"furnished the seed to sow said land and received a share of the
"crops produced upon said land as his rents from said tenants dur-
"ing said time."

VIII.

From, and including the word "that" in line 23, page 11, to and including the word "tenants" in line 15, page 12, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"That the plaintiff in this action and members of his family ever
"since the marriage of the cross-complainant to his said wife
"showed enmity and ill will towards said cross-complainant and
"his family, and on several occasions threatened the life of this
"cross-complainant and assaulted him at various times and shot at
"him and at the house in which he and his family resided upon the
"land conveyed to him by said Getta Stewart.

"Sixteenth. That said assaults were committed by said plaintiff
"and members of his family for the purpose of driving said cross-
"complainant from said premises.

"Seventeenth. That said assaults and acts of violence by said
"plaintiff inspired said cross-complainant with reasonable fear of
"his life and fear of great bodily harm to his family and induced
"him to remove with his family temporarily to Martinez.

"Eighteenth. That after such removal said cross-complainant
"maintained possession of said premises by tenants who cultivated
"the land for him for a share of the crops raised thereon, and that
"the said plaintiff in this action and members of his family acting
"for him committed similar acts of violence towards said tenants,
"and upon two occasions some of them were arrested therefor on
"complaint of said tenants."

IX.

From, and including the word "that" in line 16, page 12, to and including the word "part" in line 19, page 12, of said cross-complaint, which said allegation is in the words and figures following, to wit:

"That prior to the alleged settlement of plaintiff, his father had "a large tract of public land in his possession, of which the portion "included in plaintiff's pre-emption claim not in the possession of "the cross complainant was a part."

X.

From, and including the word "that" in line 20, page 12, to and including the word "time" in line 23, page 12, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"That at the time of said alleged pre-emption settlement of the "plaintiff, January 19, 1878, he had but recently reached the age "of twenty-one years, and had resided with his said father prior "and up to that time."

Said motion will be made upon the complaint of plaintiff, the Amended Answer and Cross-complaint of defendant, and all of the papers and records on file and of record in this case.

Said motion will be made upon the ground, that the allegations and matters in said Amended Cross-complaint herein specified, and sought to be stricken out by said motion and each of them are irrelevant, redundant, immaterial and surplusage.

Respectfully,

CHAS. E. WILSON,
W. S. WELLS,
*Attorneys for Plaintiff.*

To James Stewart, defendant, and Theo. Wagner, Esq., and G. W. Bowie, Esq., attorneys for defendant.

[Endorsed:] Service of the within motion to strike out parts of Amended Cross-complaint is hereby admitted and copy thereof received this 26th day of December, A. D. 1891.

THEO. WAGNER and
G. W. BOWIE,
*Attorneys for Defendant.*

Filed Dec. 26, 1891.

F. L. GLASS, *Clerk.*

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*Order on Motion to Strike out Portions of Amended Cross-Complaint.*

[TITLE OF COURT AND CAUSE.]

The plaintiff's motion to strike out parts of amended cross-complaint having been submitted to the Court for decision and taken under advisement and having now sufficiently considered the same, it is ordered that said motion to strike out be allowed as to the second paragraph thereof and denied as to the other portion.

I hereby certify that the foregoing is a true and correct copy of an order entered on the minutes of said Superior Court on the date aforesaid, in the above entitled cause.

Witness my hand and the seal of said Superior Court affixed, this first day of August, 1892.

[SEAL.]

F. L. GLASS, *Clerk.*
By ELMER G. COX, *Deputy Clerk.*

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*Demurrer to Amended Cross-Complaint.*

[TITLE OF COURT AND CAUSE.]

Now comes the plaintiff above named and demurs to the Amended Cross-complaint of defendant filed herein, and for ground of demurrer alleges:

I.

The said Amended Cross-complaint does not state facts sufficient to constitute a cause of action.

II.

That said Amended Cross-complaint does not state facts sufficient to constitute a defense to said action.

Wherefore, plaintiff prays that defendant take nothing by reason of said Amended Cross-complaint.

CHAS. E. WILSON and
WM. S. WELLS,
*Attorneys for Plaintiff.*

[Endorsed:] Service of the within demurrer is hereby admitted by copy this 19th day of January, A. D. 1892.

THEO. WAGNER and
G. W. BOWIE,
*Atty's for Defendant.*

Filed Feb. 2, 1892.

F. L. GLASS, *Clerk.*

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*Order Sustaining Demurrer to Amended Cross-Complaint.*

[Title of Court and Cause.]

In this action the Demurrer to the Amended Cross-complaint herein filed is submitted to the Court for decision on the oral argument heretofore made and the points and authorities furnished by counsel for the respective parties, and the Court having now sufficiently considered the same and being fully advised in the premises. It is ordered that said Demurrer to Amended Cross-complaint herein, be and the same is hereby sustained and the defendant is allowed ten days to amend if he shall be so advised.

I hereby certify that the foregoing is a true and correct copy of an order entered on the minutes of said Superior Court on the date aforesaid in the above-entitled cause.

Witness my hand and the seal of said Superior Court affixed, this first day of August, 1892.

[SEAL.]

F. L. GLASS, *Clerk.*
By ELMER G. COX, *Deputy Clerk.*

*Judgment.*

[Title of Court and Cause.]

This cause came on regularly for trial in this Court on the 1st day of August, A. D. 1892, Wm. S. Wells, Esq., appearing as counsel for plaintiff, and Theo. Wagner for the defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried by the Court sitting without a jury.

Witnesses on the part of the plaintiff and defendant were duly sworn and examined and other evidence introduced, and other proofs made of the allegations in plaintiff's complaint contained, and the cause was argued by the counsel for the respective parties and submitted to the Court for decision, and findings of fact having been duly waived in open Court by the counsel for the respective parties, and now all and singular the premises being by the Court seen, heard, fully understood and considered, on motion of Wm. S. Wells, Esq., attorney for paintiff:

It is ordered, adjudged and decreed that the plaintiff herein, D. S. C. McHarry, do have and recover from the said defendant, James Stewart, the possession of all and singular the following described premises, situate in the County of Contra Costa, State of California, that is to say: Lots number two (2) and three (3) of Section number twenty-two (22), and Lot numbered one (1), and the N. E. Quarter of the N. E. Quarter of Section twenty-seven (27), in Township number two (2) north of range number three (3) west, Mt. Diablo Base and Meridian, according to the official survey of the Government of the United States; and also the sum of Fifty Dollars ($50.00), value of the rents, issues and profits of said premises; and the sum of 18 10-100 dollars, costs of suit herein.

Done in open Court, this 1st day of August, A. D. 1892.

JOS. P. JONES,
*Judge of the Superior Court.*

[Endorsed:] Filed August 1st, ~~1892~~. *1892*
F. L. GLASS, *Clerk.*

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*Plaintiff's Bill of Exceptions to Order Refusing to Strike Out Portions of Defendant's Amended Cross-Complaint.*

[Title of Court and Cause.]

Be it remembered that on the 4th day of January, 1892, plaintiff's motion to strike out portions of defendant's Amended Cross-complaint, came on regularly to be heard; W. S. Wells, Esq., appearing for plaintiff, and G. W. Bowie, Esq., appearing for defendant.

Said motion was made upon notice duly served upon said defendant, of which the following is a true copy:

[Title of Court and Cause.]

Please take notice, that on ——— the —— day of ——— 1892, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, at the Court-room of said Court, in the Court-house at Martinez, the plaintiff will move this Honorable Court for an order striking out of and from the Amended Complaint of the defendant filed herein, the following allegations and matters in said Amended Cross-complaint, viz:

I.

From, and including the word "that" in line 6, page 5, to and including the word "entry" in line 3, page 6, of said cross-complaint, said allegations being in the words and figures following, to wit:

"That at the hearing of said contest in the said United States "Land Office before said Register and Receiver, the fact was "proved that this cross-complainant had been in the actual, peace-"able and continuous possession of the land included in his said "Homestead Entry since the month of March, A. D. 1876. That "at said hearing the fact was proven that Getta Stewart, wife of "this cross-complainant, was in the actual possession of the land "conveyed to this cross-complainant by deed, a copy of which is "hereto attached marked 'Exhibit A,' and had been in the actual "possession thereof since the year 1871 to the date of said convey-"ance, and that with the said deed she delivered possession thereof "to said cross-complainant, and that said cross-complainant then "took possession and was in the actual possession thereof and resid-"ing thereon with his family, consisting of his wife, said Getta Stew-"art, and her children by her former marriage, on the 10th day of "December, A. D. 1883; and that the said facts thus proven were "not disputed, and that no evidence whatever to put said facts so "proven in issue was ever brought before said Land Officers at "said hearing; that the said Register and Receiver refused to and "did not consider said evidence and facts so proven, and made no "finding thereon but ruled that this cross-complainant claimed "ownership of the land conveyed to him by Getta Stewart, by virtue "of a deed from his wife, and that said cross complainant acquired "no right or title by his purchase from his wife to the land adjoin-"ing the land embraced in his Homestead Entry."

II.

From, and including the word "that" in line 4, page 6, to and including the word "assaults" in line 16, page 6, of said cross-complaint, said allegations being in the words and figures following, to wit:

"That at the hearing of said contest before said Register and "Receiver, the fact was proven that the plaintiff and members of his "family threatened the life of this cross-complainant and attacked "him at various times since he took possession of said lands, shot "at him and at the house at which he and his family resided, and "thus put this cross-complainant in reasonable fear of his life and "of personal violence of himself and family, and thereby compelled "him to remove to the Town of Martinez; and that thereafter this "cross-complainant employed tenants who held actual possession of "said land for him and that said tenants were assaulted by said "plaintiff in a similar manner, and that upon two occasions said "plaintiff and members of his family were arrested for such as-"saults."

III.

From, and including the word "that" in line 16, page 6, to and including the word "same" in line 18, page 6, of said cross-complaint, said allegations being in the words and figures following, to wit:

"That said Register and Receiver refused to find facts from such "testimony, but decided that it was unnecessary to consider the "same."

IV.

From, and including the word "that" in line 18, page 6, to and including the word "Stewart" in line 25, page 6, of said cross-complaint, said allegations being in the words and figures following, to wit:

"That the fact was proven before said Register and Receiver at "said hearing that portion of the land described in plaintiff's com-"plaint included in this cross-complainant's Homestead Entry had "been and was then in the actual possession of said cross-com-"plainant and was not then and never had been in the possession "of the plaintiff and had been and was then included in the "enclosure with the land conveyed to this cross complainant by "Getta Stewart."

V.

From, and including the word "that" in line 25, page 6, to and including the word "claim" in line 1, page 7, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"That the said plaintiff claimed to have made a settlement upon "adjoining subdivisions of land and by reason of such settlement "included the land in the possession of, and included in the Home-"stead Entry of this cross-complainant, in his said pre-emption "claim."

VI.

From, and including the word "cross-complainant" in line 8, page 7, to and including the word "Stewart" in line 12, page 7, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"Cross-complainant further alleges that said Register and Re-"ceiver, in thus deciding, misapplied the law and the facts, and "that they had no jurisdiction to inquire into and decide upon the "title of cross-complainant to the land conveyed to him by Getta "Stewart."

VII.

From, and including the word "that" in line 12, page 11, to and including the word "time" in line 19, page 11, of said cross-complaint, which said allegations are in the words and figures following, to wit:

"That during the time said land was cultivated by said cross-"complainant through tenants, the house forming his residence "upon the tract conveyed to him by his said wife was specially "reserved to himself and family and was occupied by him and his "family at short intervals, and that the said cross-complainant

" furnished the seed to sow said land and received a share of the " crops produced upon said land as his rent from said tenants dur- " ing said time."

VIII.

From, and including the word " that " in line 23, page 11, to and including the word " tenants " in line 15, page 12, of said cross-complaint, which said allegations are in the words and figures following, to wit:

" That the plaintiff in this action and members of his family ever " since the marriage of the cross-complainant to his said wife " showed enmity and ill will towards said cross-complainant and " his family, and on several occasions threatened the life of this " cross-complainant and assaulted him at various times and shot at " him and at the house in which he and his family resided upon " the land conveyed to him by said Getta Stewart.

" Sixteenth. That said assaults were committed by said plaintiff " and members of his family for the purpose of driving said cross- " complainant from said premises.

" Seventeenth. That said assaults and acts of violence by said " plaintiff inspired said cross-complainant with reasonable fear of " his life and fear of great bodily harm to his family and induced " him to remove with his family temporarily to Martinez.

" Eighteenth. That after such removal cross-complainant main- " tained possession of said premises by tenants who cultivated the " land for him for a share of the crops raised thereon, and that the " said plaintiff in this action and members of his family acting for " him committed similar acts of violence towards said tenants, and " upon two occasions some of them were arrested therefor on com- " plaint of said tenants."

IX.

From, and including the word " that " in line 16, page 12, to and including the word " part " in line 19, page 12, of said cross-complaint, which said allegation is in the words and figures following, to wit:

" That prior to the alleged settlement of plaintiff his father had a " large tract of public land in his possession, of which the portion " included in plaintiff's pre-emption claim not in the possession of " the cross-complainant was a part."

X.

From, and including the word " that " in line 20, page 12, to and including the word " time " in line 23, page 12, of said cross-complaint, which said allegations are in the words and figures following, to wit:

" That at the time of said alleged pre-emption settlement of the " plaintiff, January 19, 1878, he had but recently reached the age " of twenty-one years, and had resided with his said father prior " and up to that time."

Said motion will be made upon the complaint of plaintiff, the Amended Answer and Cross-complaint of defendant, and all the papers and records on file and of record in this case.

Said motion will be made upon the ground that the allegations

and matters in said amended cross complaint herein specified and sought to be stricken out by said motion and each of them are irrelevant, redundant, immaterial and surplusage.

Respectfully,

CHAS. E. WILSON and
WM. S. WELLS,
*Attorneys for Plaintiff.*

To James Stewart, defendant, and Theo. Wagner, Esq., and G. W. Bowie, Esq., attorneys for defendant.

After argument by the respective counsel, the Court refused to strike out of said Amended Cross-complaint any or either of the allegations of said Amended Cross-complaint except the second paragraph of said Amended Cross-complaint, and the Court allowed said motion as to the second paragraph of said Amended Cross-complaint and denied and overruled said motion as to the other parts, to which refusal and ruling of the Court the plaintiff then and there duly excepted.

I hereby certify that the foregoing bill of exceptions is correct, and the same is hereby settled and allowed, this 19th day of February, 1892.

JOS. P. JONES,
*Judge of the Superior Court.*

Stipulated and agreed that the foregoing is a true and correct bill of exceptions and that the same may be allowed and settled by the Judge.

Dated Feb. 19, 1892.

CHAS. E. WILSON,
W. S. WELLS,
*Attorneys for Plaintiff.*
THEO. WAGNER and
G. W. BOWIE,
*Attorneys for Dependant*

[Endorsed:] Filed Feb. 23, 1892.

F. L. GLASS, *Clerk.*

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*Notice of Appeal*

[Title of Court and Cause.]

To the Clerk of said Superior Court, and to Charles E. Wilson and to Wm. S. Wells, attorneys for said plaintiff:

Please take notice that the defendant in the above entitled action hereby appeals to the Supreme Court of this State, from the judgment therein made and entered in said Superior Court on the first day of August, A. D. 1892, in favor of the said plaintiff, and from the whole thereof, and also from the order duly made and entered by said Superior Court in said action on the 16th day of May, 1892, sustaining the plaintiff's demurrer to defendant's Amended Cross-complaint.

THEO. WAGNER and
G. W. BOWIE,
*Attorneys for Defendant.*

[Endorsed:] Due service of a copy of the within notice is hereby admitted to have been made this 9th day of August, A. D. 1892.

CHAS. E. WILSON and
WM. S. WELLS.

Filed Aug. 11, 1892.

F. L. GLASS, *Clerk.*

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*Certificate of Judgment Roll.*

[TITLE OF COURT AND CAUSE.]

I, the undersigned, County Clerk of said county and ex-officio Clerk of the Superior Court therein, do hereby certify the foregoing to be a true copy of the Judgment rendered in the above entitled action, and entered in Vol. 4, Judgment Book of said Court, at page 358.

And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand and the seal of our Superior Court affixed, this 1st day of August, 1892.

[SEAL.] F. L. GLASS, *Clerk.*

[Endorsed:] Filed August 1st, 1892.

F. L. GLASS, *Clerk.*

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*Certificate of Clerk.*

[TITLE OF COURT AND CAUSE.]

STATE OF CALIFORNIA,
*County of Contra Costa*, ss.

I, F. L. Glass, County Clerk of the County of Contra Costa, and ex-officio Clerk of the Superior Court of the County of Contra Costa, State of California, do hereby certify that the papers contained in the foregoing transcript on appeal are correct copies of the original papers on file, and of orders entered on the minutes in said cause.

And I do further certify that good and sufficient undertakings on appeal in due form have been properly filed.

In witness whereof, I have hereunto set my hand, and affixed the official seal of the Superior Court at said County of Contra Costa, this.....day of September, A. D. 1892.

[SEAL.] F. L. GLASS, *Clerk.*

[Endorsed:] Filed this 27th day of September, A. D. 1892.

L. H. BROWN, *Clerk.*

By D. S. CULP, *Deputy Clerk.*

*Orders.*

In the Supreme Court of the State of California.
No. 15,187.
In Bank (Chambers).

D. S. C. McHARRY, *Respondent*, v. JAMES STEWART, *Appellant*. | On Appeal from the Superior Court of the County of Contra Costa.

By the Chief Justice.

Ordered that the foregoing case be assigned to Department One.

BEATTY, *C. J.*

Entered Sept. 27, 1893.

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In the Supreme Court of the State of California.
No. 15,187. Dept. 1.

DAN'L S. C. McHARRY, *Respondent*, v. JAMES STEWART, *Appellant*. | On Appeal from the Superior Court of the County of Contra Costa.

By the Court.

The foregoing cause is hereby ordered submitted.

PATERSON, *J.*

Entered Sept. 27, 1893.

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*Judgment.*

In the Supreme Court of the State of California.
No. 15,187.
Department One.

DANIEL S. C. McHARRY, *Respondent*, v. JAMES STEWART, *Appellant*. | On Appeal from the Superior Court in and for the County of Contra Costa.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by

PATERSON, *J.*

Concurring opinion:

HARRISON, *J.*
GAROUTTE, *J.*

Whereupon, it is adjudged and decreed by the Court that the judgment of the Superior Court in and for the County of Contra Costa in the above-entitled cause, be and the same is hereby affirmed.

Entered December 30, 1893.

*Opinion.*

In the Supreme Court of the State of California.

Department One.

DAN'L S. C. MCHARRY, *Respondent*, v. JAMES STEWART, *Appellant*.

No. 15,187.

On Appeal from the Superior Court of the County of Contra Costa.

The complaint is in ejectment, in the usual form, and the plaintiff's title is evidenced by a patent from the United States. Defendant answered, denying all the allegations of the complaint (except that alleging defendant's possession), and filed a cross-complaint setting out facts upon which he claims that plaintiff should be adjudged a trustee of the legal title for his benefit, and be required to convey the same to him.

Plaintiff's demurrer to the cross-complaint was sustained, and judgment thereon, as well as upon the issues raised by defendant's answer, which were tried by the Court, was rendered against the defendant, who now appeals from the judgment; and the only question presented is as to the sufficiency of the cross-complaint.

On December 10, 1883, the defendant filed upon the demanded premises as an "adjoining farm homestead," under Sections 2,289 and 2,290, U. S. Rev. Stats., defendant then claiming to be the owner of about sixty acres of adjoining lands upon which he resided.

On December 13, of the same year, the plaintiff, claiming a residence upon a subdivision of government lands adjoining the demanded premises, filed a pre-emption claim including the demanded premises.

Upon these conflicting claims a contest arose before the local Land Office, and testimony was taken. The cross-complaint set out the facts which defendant claims were proven upon the hearing, and, by exhibits attached thereto, sets out the decision of the Register and Receiver thereon, the decision of the Commissioner of the General Land Office upon appeal, the decision of the Secretary of the Interior upon appeal from the Commissioner, and also the decision of the Secretary upon a petition for review.

The land which defendant claimed to own, and upon which he claimed to reside at the time he filed upon the demanded premises, was formerly a part of the Pinole Rancho in which one James McClellan owned an undivided interest, which, after his marriage, was set off to him in that part of the rancho adjoining the demanded premises. McClellan died in December, 1871, leaving his widow, Getta, and two minor children surviving him. In February, 1876, a homestead containing 175 acres was set apart by the Probate Court for the use of the widow and minor children in that part of the land partitioned to McClellan which adjoined the demanded premises. Afterward, in March, 1876, the widow married the defendant Stewart. On October 2, 1882, Mrs. Stewart conveyed to her husband, the defendant, a portion of the homestead containing about sixty acres adjoining the demanded premises, the children still being minors.

Upon these facts, and without considering the other evidence before them, the Register and Receiver held that the defendant acquired no right or title by his purchase from his wife, and therefore was not entitled to an "adjoining farm homestead" under the statute, and awarded the land to McHarry.

On appeal to the Commissioner this decision was reversed, and the land was awarded to Stewart; and upon appeal to the Secretary, the Commissioner's decision was reversed, and the land again awarded to McHarry.

The evidence taken before the Register and Receiver principally related to two points, viz: Stewart's ownership and title to the land conveyed to him by his wife and his residence thereon. It is conceded that after Stewart filed upon the demanded premises, his residence was principally in Martinez, where he had gone into business. He claimed, however, that he left the land in consequence of assaults made upon him by the McHarrys, and threats which put him in fear. The Register and Receiver did not pass upon this evidence, but rested their decision solely upon want of title to the adjoining lands, while the Commissioner held his title sufficient and that his absence from the land was excused by the acts of McHarry. The Secretary held against Stewart on both points.

So far as questions of facts are concerned, all Courts are bound by the decision of the Land Department, unless such decision has been obtained by fraud or imposition. In this case we find nothing to justify a review of questions of fact. Shanklin *v.* McNamara, 87 Cal., 371; Lee *v.* Johnson, 116 U. S., 48, and cases there cited. The principal questions are, therefore, *First*, whether Stewart's ownership and title was sufficient to entitle him to an additional farm homestead; and, if that is answered in the affirmative, *Second*, whether his residence on the land conveyed to him by his wife was such as the law required for the purpose of securing such additional homestead.

The land set apart by the Probate Court as a homestead was the separate property of the deceased, James McClellan. Such homesteads, when not community property, can only be set apart for a limited time. The *estate* in the lands so set apart vests, however, in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the Court; and, at the expiration of the time limited for its existence, is subject to partition as though no homestead had been created. Section 1468, C. C. P. (Act of March 24, 1874, as well as the Act of 1881), provides: "If the deceased also left a minor child or children, the one-half of such property shall *belong* to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one."

In the estate of Moore, 57 Cal., 444, it was said: "The *right* to have a homestead set apart is *no estate*, either in law or in equity." It was accordingly there held that the deed of the widow, made before the homestead was set apart, did not nor could convey away the *right* to a homestead; but it was not held that the deed was not operative to convey all her interest in the estate which she took by succession; such interest being subject to the power of the Court to

set apart a homestead. Her grantee therefore took the estate and was the owner of it, but subject to the homestead afterward set apart by the Court.

If this were doubtful under the provisions of the code above referred to, Section 1,485, C. C. P., makes it clear. It is there provided: "Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire." The obvious intent of this section is to confirm to purchasers of the estate all the rights and interests which the grantor had or could enjoy, subject to the homestead right, and at the termination of the homestead the unincumbered estate. The words "successors to homesteads" certainly imply this.

Stewart therefore had title to the land and was the owner. But it is contended by respondent, and the Secretary of the Interior seems principally to have relied thereon, that he took but an undivided interest in the homestead, and when the land came to be partitioned the land set off to him might not adjoin the demanded premises.

Section 764, C. C. P., provides, among other things, as follows: "Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds, out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance."

To defeat Stewart's right upon this ground it must be assumed that partition cannot be made so as to give him the part of the land conveyed to him, or some part of it adjoining the public lands in question, or that the bare possibility of such result is sufficient to defeat the right to an adjoining homestead. It will hardly be contended that if Stewart's ownership and title were otherwise unquestioned, the existence of a mortgage upon it would defeat his right to an additional homestead because his title, at some time in the future, might be taken away by foreclosure and sale; yet respondent's contention, carried to its logical conclusion, would seem to lead to that result.

The contingency in question does not destroy or affect Stewart's ownership for the purpose of the homestead right, and the Register and the Receiver and the Secretary erred in so holding.

The question of Stewart's residence is one of greater difficulty. It may be conceded that the cross-complaint shows that his residence upon the land purchased from his wife was not continuous; but

facts are alleged, which, if satisfactorily proved, would excuse his absence from it. The cross-complaint, however, sets out in full, as exhibits, the decision of the Commissioner of the General Land Office in his favor upon that question, and the decision of the Secretary of the Interior reversing that decision, thus presenting the question of the jurisdiction of the Court to re-examine it.

It is contended by appellant that all the questions presented by the contest before the Register and Receiver, upon which evidence was introduced, should have been decided by them and that the Commissioner and Secretary had no power to pass upon questions of fact not passed upon by the Register and Receiver; that it was the duty of the Commissioner, when he reversed those officers upon the only question passed upon by them, to send the case back with instructions to pass upon all the other questions; and this contention is placed by appellant upon Section 2,273, U. S. Rev. Stats., which provides that "All questions as to the right of pre-emption arising between different settlers shall be determined by the Register and Receiver of the district within which the land is situated," and which provides for "appeals from the decision of the district officers" to the Commissioner, and this right to have all the questions of fact decided by the local officers, he insists, is an important and substantial one, as the weight to be given the testimony of the different witnesses can be better estimated by them than by those who had no opportunity to observe the witnesses while giving their testimony.

Prior to the act of July 4th, 1836, 5 Stats. at Large, 107, there seems to have been no express power given to the Commissioner of the General Land Office to revise the decisions of the local land officers, but where an entry was made on *ex parte* affidavits, which were impeached before the Commissioner by another claimant, the course was to return the proofs to the local office and direct that the parties be notified, and after proofs taken to report the proceedings to the General Land Office, with their opinion as to the effect of the proof. See Barnard's Heirs *v.* Ashley's Heirs, 18 How., 44.

By Section 11 of the Act of September 4, 1841, 5 Stats. at Large, p. 456, all questions arising between different settlers were required to be "settled by the Register and Receiver of the district within which the land is situated, subject to an appeal to, and a revision by, the Secretary of the Treasury;" and by the Act of June 12, 1858, 11 Stats. at Large, 310, p. 326, the latter clause of Section 2 273, Rev. Stats., was enacted.

The power of the Commissioner and Secretary upon appeal to decide all questions arising upon the evidence taken by the Register and Receiver is not limited in any of the statutes relating to appeals, and the practice of so deciding all questions upon appeal is too well settled to justify us in denying them that power.

That the error of law committed by the Register and Receiver and affirmed by the Secretary of the Interior had a far-reaching effect cannot be disputed. Stewart had been in possession of the demanded premises many years before the township plat was filed, and the same was fenced in with the land upon which he resided,

and he filed his adjoining homestead claim thereon the day the township plat was filed. No question seems to have been made as to his place of residence at the time of his filing, nor at the time McHarry filed, which was but three days thereafter.

That being true, McHarry's filing was illegal, the land being then in the rightful possession and occupation of Stewart. But if Stewart, by reason of his failure to reside on the adjacent land was not entitled to it, the question whether McHarry was entitled was one between him and the government in which appellant is not concerned.

The question of residence being one of fact, and having been litigated before the Land Department, we would not have jurisdiction to examine it, even if the evidence was before us, in the absence of a clear showing that the decision was procured by fraud or imposition, and we find no such allegation of fraud or imposition in the cross-complaint as would justify the submission of the question of residence to a court of justice.

It is argued by appellant, however, that in the case of an adjoining homestead the requirements of the law applicable to other homesteads upon the public lands do not apply. The rulings of the Land Department have been otherwise, and we think correctly. Carnes *v.* Smith, 10 Land Decisions, 100; Box *v.* Cochran, 3 *Id.*, 394. Residence upon the public land filed upon is excused because that, with the land owned, is regarded as one homestead, and residence upon any part is sufficient; but residence is essential to a homestead of either kind.

The judgment appealed from should be affirmed.

HAYNES, *C.*

We concur:

SEARLS, *C.*,
VANCLIEF, *C.*

For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

PATERSON, *J.*

*Concurring Opinion.*

We concur in the judgment upon the ground that the decision of the Land Department that Stewart was not residing upon the premises at the time he made the homestead entry is a conclusive determination against his claim to the land. Whether the conveyance by the widow of McClellan of her interest in a portion of the premises that had been set apart as a homestead for the benefit of herself and her minor children during the existence of the homestead, transferred to her grantee any title therein, is a question which does not arise in this case, and is of too much importance to be unnecessarily determined. See Gagliardo *v.* Dumont, 54 Cal., 496; Phelan *v.* Smith, 6 Cal. Dec., 171.

HARRISON, *J.*
GAROUTTE, *J.*

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed December 30th, 1893, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of February A. D. 1894.

[SEAL.] L. H. BROWN, *Clerk.*
By GEO. A. MCCALVY, *Deputy Clerk.*

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In the Supreme Court of the State of California.

DANIEL S. C. MCHARRY, *Plaintiff and Respondent,*
*v.*
JAMES STEWART, *Defendant and Appellant.*
*Petition for Rehearing.*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of California.

The appellant respectfully petitions for a rehearing of this cause and that the same be heard by the honorable Court *in banc.*

In order to facilitate the statement of the questions involved in this cause we deem it best to first set out the decision made by Department One of this Court in this cause upon which we petition for a rehearing by the Court *in banc.*

That decision, according to the copy furnished us, is as follows, to wit:

Department One.

DANIEL S. C. MCHARRY, *Respondent,*
*v.*
JAMES STEWART, *Appellant.*
No. 15,187.

The complaint is in ejectment, in the usual form, and the plaintiff's title is evidenced by a patent from the United States. Defendant answered, denying all the allegations of the complaint (except that alleging defendant's possession), and filed a cross-complaint setting out facts upon which he claims that plaintiff should be adjudged a trustee of the legal title for his benefit, and be required to convey the same to him.

Plaintiff's demurrer to the cross-complaint was sustained, and judgment thereon, as well as upon the issues raised by defendant's answer, which were tried by the Court, was rendered against the defendant, who now appeals from the judgment; and the only question presented is as to the sufficiency of the cross complaint.

On December 10, 1883, the defendant filed upon the demanded premises as an "adjoining farm homestead," under Sections 2,289 and 2,290, U. S. Rev. Stats., defendant then claiming to be the owner of about sixty acres of adjoining lands upon which he resided.

On December 13, of the same year, the plaintiff, claiming a residence upon a subdivision of government lands adjoining the demanded premises, filed a pre-emption claim including the demanded premises.

Upon these conflicting claims a contest arose before the local Land Office, and testimony was taken. The cross-complaint set

out the facts which defendant claims were proven upon the hearing, and, by exhibits attached thereto, sets out the decision of the Register and Receiver thereon, the decision of the Commissioner of the General Land Office upon appeal, the decision of the Secretary of the Interior upon appeal from the Commissioner, and also the decision of the Secretary upon a petition for review.

The land which defendant claimed to own, and upon which he claimed to reside at the time he filed upon the demanded premises, was formerly a part of the Pinole Rancho in which one James McClellan owned an undivided interest, which, after his marriage, was set off to him in that part of the rancho adjoining the demanded premises. McClellan died in December, 1871, leaving his widow, Getta, and two minor children surviving him. In February, 1876, a homestead containing 175 acres was set apart by the Probate Court for the use of the widow and minor children in that part of the land partitioned to McClellan which adjoined the demanded premises. Afterward, in March, 1876, the widow married the defendant Stewart. On October 2, 1882, Mrs. Stewart conveyed to her husband, the defendant, a portion of the homestead containing about sixty acres adjoining the demanded premises, the children still being minors.

Upon these facts, and without considering the other evidence before them, the Register and Receiver held that the defendant acquired no right or title by his purchase from his wife, and therefore was not entitled to an "adjoining farm homestead" under the statute, and awarded the land to McHarry.

On appeal to the Commissioner this decision was reversed, and the land was awarded to Stewart; and upon appeal to the Secretary, the Commissioner's decision was reversed, and the land again awarded to McHarry.

The evidence taken before the Register and Receiver principally related to two points, viz: Stewart's ownership and title to the land conveyed to him by his wife and his residence thereon. It is conceded that after Stewart filed upon the demanded premises, his residence was principally in Martinez, where he had gone into business. He claimed, however, that he left the land in consequence of assaults made upon him by the McHarrys, and threats which put him in fear. The Register and Receiver did not pass upon this evidence, but rested their decision solely upon want of title to the adjoining lands, while the Commissioner held his title sufficient and that his absence from the land was excused by the acts of McHarry. The Secretary held against Stewart on both points.

So far as questions of fact are concerned, all Courts are bound by the decision of the Land Department, unless such decision has been obtained by fraud or imposition. In this case we find nothing to justify a review of questions of fact. Shanklin *v.* McNamara, 87 Cal., 371; Lee *v.* Johnson, 116 U. S., 48, and cases there cited. The principal questions are, therefore, *First*, whether Stewart's ownership and title was sufficient to entitle him to an additional farm homestead; and, if that is answered in the affirmative, *Second*, whether his residence on the land conveyed to him by his wife was such as the law required for the purpose of securing such additional homestead.

The land set apart by the Probate Court as a homestead was the separate property of the deceased, James McClellan. Such homesteads, when not community property, can only be set apart for a limited time. The *estate* in the lands so set apart vests, however, in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the Court; and, at the expiration of the time limited for its existence, is subject to partition as though no homestead had been created. Section 1468, C. C. P. (Act of March 24, 1874, as well as the Act of 1881), provides: "If the deceased also left a minor child or children, the one-half of such property shall *belong* to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one."

In the estate of Moore, 57 Cal., 444, it was said: "The *right* to have a homestead set apart is *no estate*, either in law or in equity." It was accordingly there held that the deed of the widow, made before the homestead was set apart, did not nor could convey away the *right* to a homestead; but it was not held that the deed was not operative to convey all her interest in the estate which she took by succession; such interest being subject to the power of the Court to set apart a homestead. Her grantee therefore took the estate and was the owner of it, but subject to the homestead afterward set apart by the Court.

If this were doubtful under the provisions of the code above referred to, Section 1,485, C. C. P., makes it clear. It is there provided: "Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire." The obvious intent of this section is to confirm to purchasers of the estate all the rights and interests which the grantor had or could enjoy, subject to the homestead right, and at the termination of the homestead the unincumbered estate. The words "successors to homesteads" certainly imply this.

Stewart therefore had title to the land and was the owner. But it is contended by respondent, and the Secretary of the Interior seems principally to have relied thereon, that he took but an undivided interest in the homestead, and when the land came to be partitioned the land set off to him might not adjoin the demanded premises.

Section 764, C. C. P., provides, among other things, as follows: "Whenever it shall appear, in an action for the partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds, out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated par-

cel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance."

To defeat Stewart's right upon this ground it must be assumed that partition cannot be made so as to give him the part of the land conveyed to him, or some part of it adjoining the public lands in question, or that the bare possibility of such result is sufficient to defeat the right to an adjoining homestead. It will hardly be contended that if Stewart's ownership and title were otherwise unquestioned, the existence of a mortgage upon it would defeat his right to an additional homestead because his title, at some time in the future, might be taken away by foreclosure and sale; yet respondent's contention, carried to its logical conclusion, would seem to lead to that result.

The contingency in question does not destroy or affect Stewart's ownership for the purpose of the homestead right, and the Register and the Receiver and the Secretary erred in so holding.

The question of Stewart's residence is one of greater difficulty. It may be conceded that the cross-complaint shows that his residence upon the land purchased from his wife was not continuous; but facts are alleged, which, if satisfactorily proved, would excuse his absence from it. The cross-complaint, however, sets out in full, as exhibits, the decision of the Commissioner of the General Land Office in his favor upon that question, and the decision of the Secretary of the Interior reversing that decision, thus presenting the question of the jurisdiction of the Court to re-examine it.

It is contended by appellant that all the questions presented by the contest before the Register and Receiver, upon which evidence was introduced, should have been decided by them and that the Commissioner and Secretary had no power to pass upon questions of fact not passed upon by the Register and Receiver; that it was the duty of the Commissioner, when he reversed those officers upon the only question passed upon by them, to send the case back with instructions to pass upon all the other questions; and this contention is placed by appellant upon Section 2,273, U. S. Rev. Stats., which provides that "All questions as to the right of pre-emption arising between different settlers shall be determined by the Register and Receiver of the district within which the land is situated," and which provides for "appeals from the decision of the district officers" to the Commissioner, and this right to have all the questions of fact decided by the local officers, he insists, is an important and substantial one, as the weight to be given the testimony of the different witnesses can be better estimated by them than by those who had no opportunity to observe the witnesses while giving their testimony.

Prior to the Act of July 4th, 1836, 5 Stats. at Large, 107, there seems to have been no express power given to the Commissioner of the General Land Office to revise the decisions of the local land officers, but where an entry was made on *ex parte* affidavits, which were impeached before the Commissioner by another claimant, the course was to return the proofs to the local office and direct that the parties be notified, and after proofs taken to report the proceed-

ings to the General Land Office, with their opinion as to the effect of the proof. See Barnard's Heirs *v.* Ashley's Heirs, 18 How., 44.

By Section 11 of the Act of September 4, 1841, 5 Stats. at Large, p. 456, all questions arising between different settlers were required to be "settled by the Register and Receiver of the district within which the land is situated, subject to an appeal to, and a revision by, the Secretary of the Treasury;" and by the Act of June 12, 1858, 11 Stats. at Large, 310, p. 326, the latter clause of Section 2 273, Rev. Stats., was enacted.

The power of the Commissioner and Secretary upon appeal to decide all questions arising upon the evidence taken by the Register and Receiver is not limited in any of the statutes relating to appeals, and the practice of so deciding all questions upon appeal is too well settled to justify us in denying them that power.

That the error of law committed by the Register and Receiver and affirmed by the Secretary of the Interior had a far reaching effect cannot be disputed. Stewart had been in possession of the demanded premises many years before the township plat was filed, and the same was fenced in with the land upon which he resided, and he filed his adjoining homestead claim thereon the day the township plat was filed. No question seems to have been made as to his place of residence at the time of his filing, nor at the time McHarry filed, which was but three days thereafter.

That being true, McHarry's filing was illegal, the land being then in the rightful possession and occupation of Stewart. But if Stewart, by reason of his failure to reside on the adjacent land was not entitled to it, the question whether McHarry was entitled was one between him and the government in which appellant is not concerned.

The question of residence being one of fact, and having been litigated before the Land Department, we would not have jurisdiction to examine it, even if the evidence was before us, in the absence of a clear showing that the decision was procured by fraud or imposition, and we find no such allegation of fraud or imposition in the cross-complaint as would justify the submission of the question of residence to a court of justice.

It is argued by appellant, however, that in the case of an adjoining homestead the requirements of the law applicable to other homesteads upon the public lands do not apply. The rulings of the Land Department have been otherwise, and we think correctly. Carnes *v.* Smith, 10 Land Decisions, 100; Box *v.* Cochran, 3 *Id.*, 394. Residence upon the public land filed upon is excused because that, with the land owned, is regarded as one homestead, and residence upon any part is sufficient; but residence is essential to a homestead of either kind.

The judgment appealed from should be affirmed.

HAYNES, *C.*

We concur:

SEARLS, *C.*,

VANCLIEF, *C.*

For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be affirmed.

PATERSON, *J.*

*Concurring Opinion.*

We concur in the judgment upon the ground that the decision of the Land Department that Stewart was not residing upon the premises at the time he made the homestead entry is a conclusive determination against his claim to the land. Whether the conveyance by the widow of McClellan of her interest in a portion of the premises that had been set apart as a homestead for the benefit of herself and her minor children during the existence of the homestead, transferred to her grantee any title therein, is a question which does not arise in this case, and is of too much importance to be unnecessarily determined. See Gagliardo *v.* Dumont, 54 Cal., 496; Phelan *v.* Smith, 6 Cal. Dec., 171.

HARRISON, *J.*
GAROUTTE, *J.*

Filed December 30, 1893.

L. H. Brown, Clerk
By P. V. Long, *Deputy.*
~~D. H. BROWN, Clerk.~~

There are four distinct questions raised and decided in this cause, three of which have never before been directly decided by any Court of last resort.

These questions are as follows:

*First.*—The question what degree and kind of ownership may be required as the basis for an adjoining farm homestead entry.

This point is discussed at length in the opinion of the Commissioners, and their views are concurred in by his Honor Justice Paterson, but Justices Harrison and Garoutte in their opinion rule as to this point that it is a question which does not arise in this case and is of too much importance to be unnecessarily determined, and they base their ruling upon the ground that the decision of the Land Department *that the appellant was not residing upon the premises at the time he made his homestead entry*, is a conclusive determination against his claim to the land. The opinion of the Court Commissioners concurred in by Hon. Justice Paterson upon this point recites:

"No question seems to have been made as to his (appellant's) place of residence at the time of his filing, nor at the time McHarry filed, which was but three days thereafter."

Now we claim that the Land Department never decided that the appellant was not residing upon the land *at the time he made his homestead entry*. It seems clear that if Justices Harrison and Garoutte were in error as to this point that the case should be reheard, for then it may be necessary for at least one more member of the Court to concur in the decision as to the other points, and the question of what kind of ownership of the original farm may be required for an adjoining farm homestead entry may then require to be decided; the decisions by the Land Department upon this question have been very conflicting and the point has never been decided by a Court of last resort. A decision upon this point is much to be

desired, for the question is one of importance which ought to be decided by the Court *in banc*.

*Second.*—Where the Register and Receiver, in a contest before them, erroneously decide the case upon a question of law arising therein, and do not decide or pass upon disputed questions of fact at all, and so state in their decision from which appeal is taken to the Commissioner of the General Land Office and Secretary of the Interior, have those officers power under such circumstances, under their appellate jurisdiction, to pass upon the disputed questions of fact, none of which were passed upon by the Register and Receiver?

The decision above quoted as to this point seems to rest upon the assumption "that the practice of so deciding all questions upon appeal by the Commissioner and Secretary is too well settled to justify the Court in denying them that power." In this assumption we believe the Court was in error, and even if such a practice had obtained we respectfully call attention to the fact that it would be directly contrary to the letter and spirit of the law, Section 2273, U. S. Rev. Stats., which provides that "*All* questions as to the right of pre emption *shall* be determined by the Register and Receiver of the district within which the land is situated." The law only grants appellate jurisdiction to the Commissioner and Secretary. No matter how ancient the practice might be, if it is against law it ought not to stand. There may be cases in which long established practice may even modify to some extent the strict letter of the law, but in no case can practice be held to abrogate or override law in letter and spirit. In cases where practice might be held to modify to any extent the strict letter of the law, there must be some reason to commend the practice; a bad practice will surely not be allowed to modify law simply because of the length of time it has prevailed. Now, if there was such a practice as is assumed in the decision, it is surely a bad practice; nothing could illustrate that fact better than this case, and there is no reason why such a practice should be allowed to continue; there can be no reason why it should be allowed to prevail against the positive requirements of the law. If the Courts do not sanction such a practice, the Interior Department will no doubt modify its practice, which can easily be done by proper instructions to the Registers and Receivers; it will involve no trouble or hardship upon any one, and will undoubtedly greatly improve the administration of the land laws. There is then every reason why such a practice, if it has obtained, should not be sanctioned by this Court. The question affects the rights of settlers upon the public lands generally and is very important to them, and, therefore, we contend that the decision of Department One ought to be reviewed and the case heard by the Court *in banc*.

*Third.*—The Court, Department One, decides that "McHarry's filing was illegal, the land being then in the rightful possession and occupation of Stewart, but if Stewart, by reason of his failure to reside on the adjacent land, was not entitled to it, the question whether McHarry was entitled was one between him and the Government in which the appellant is not concerned." In coming to the latter conclusion the Court evidently did not take into consid-

eration the provisions of Sections 2450 to 2457 of the U. S. Revised Statutes. If McHarry's filing was illegal and he acquired no rights by his entry of the land, then Stewart's equity may be asserted under those sections and "upon principles of equity and justice as recognized in Courts of equity" his entry should have been and would be patented. While conceding as an abstract proposition the soundness of the rule invoked in the decision as to this point, we contend that it must be subject to modifications in its application to particular cases wherever and to the extent that the principles of justice are promoted thereby, and with such an application of the rule we contend that the appellant has such interest in the land and such connection with the paramount source of title as to entitle him to be heard in the matter. And if this be so then the decision rendered would be erroneous and a rehearing should be granted.

*Fourth.*—This question is as to the requirements of the homestead law in the class of homestead entries for the benefit of adjoining farms, usually known as adjoining homesteads. The Land Department construes the law requiring five years residence, on the land owned, in cases of adjoining homesteads the same, as on the land entered, in the case of other homesteads and the decision of Department One of this Court sustains that ruling. This question has never been decided by a Court of last resort, and in that decision only the rulings of the Land Department are cited in support of that construction of the law. The few published decisions of the Land Department upon this point are all to the same effect, viz: requiring five years residence the same as in the case of other homesteads, but in individual cases there has always been great uncertainty as to this point and adjudications have been conflicting and vacillating. It would be well that the question should be finally settled by this Court, but as it is an important question, a decision of which will, perhaps, affect many other persons, it seems to us proper that it should be decided by the Court *in banc*, and we contend further that the decision of Department One of this Court upon this point is erroneous. In addition to what we have said upon this point in our briefs we desire to point out the fact that Section 2289, U. S. Revised Statutes, evidently makes provision for two distinct classes of entries; it authorizes them. Section 2191 provides what shall be proven before patent is issued, and here again the two classes are provided for; the section contains these words, "proves by two credible witnesses that he, she, or they have resided upon *or* cultivated the same for five years, etc.," this is in the alternative. Further on the section again contains the same provision for two classes, viz: "That the proof of residence, occupation, *or* cultivation, the affidavit of non-alienation, etc." Again, in ordinary homesteads, residence *before* entry is not required, but must be established upon the land within six months. In the case of adjoining homesteads the privilege of entry is restricted to persons *owning and residing* on land. Again, in Section 2297, the same provision for the two distinct classes of homestead entries is made as follows, if "it is proved after due notice to the settler, to the satisfaction of the Register of the Land Office that the person hav-

ing filed such affidavit has actually changed his residence *or* abandoned the land for more than six months," etc., hence we contend that in the case of adjoining farm homesteads ownership and residence at the time of entry only is required by the law and only cultivation thereafter, while in the case of original homesteads residence at time of entry is not required under the law, but must be established within six months and maintained for five years. In the case of adjoining homesteads the question of ownership and residence is determined before entry, and is thereafter *res adjudicata*; it is a prerequisite to the entry, and the admission of the entry ought to be considered a final determination of that question, except in cases of fraud, and it is for that reason that the law in adjoining homesteads only requires proof of cultivation at the expiration of five years. If our view of the law is correct it follows that the appellant's entry should have been patented. The question is one of importance and we think merits a closer examination than it received in the decision of Department One of this Court, due, no doubt, to the overwhelming amount of business thrust upon this honorable Court. We most earnestly ask, therefore, that a rehearing may be granted and that the case may be heard by the Court *in banc*, believing that upon a further examination of the case this honorable Court will be convinced that the judgment of the Court below should be reversed.

Respectfully submitted,

THEO. WAGNER,
G. W. BOWIE,
*Attorneys for Appellant.*

[Endorsed:] Filed this 16th day of January, A. D. 1894.
L. H. BROWN, *Clerk.*
By A. W. JOHNSON, *Deputy Clerk.*

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*Order.*

No. 15,187.
Bank.

DAN'L S. C. MCHARRY, *Respondent*, *v.* JAMES STEWART, *Appellant.* | On Appeal from the Superior Court of the County of Contra Costa.

Rehearing denied January 29, 1894.

THE COURT.

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*Petition for Writ of Error.*

In the Supreme Court of the State of California.

DANIEL S. C. MCHARRY, *Respondent*,
*v.*
JAMES STEWART, *Appellant.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

Your petitioner, James Stewart, the appellant in the above entitled case, respectfully shows:

That the above-entitled action is an action in ejectment commenced by the respondent against the appellant in the Superior Court of the County of Contra Costa, State of California, on July 1st, 1891, for the recovery of certain lands in the complaint in said action specifically described. That the appellant, the defendant in the Court below, on the 16th day of December, 1891, filed an answer and cross-complaint in said action pending as to a portion of the lands described in the complaint. That in said cross-complaint this defendant alleged that on the 10th day of December, 1883, the defendant was residing on and was the owner of certain lands in said cross-complaint described, which said lands adjoined a portion of the lands described in the complaint for which recovery was sought in said action. That on the said 10th day of December, 1883, the said defendant appeared in person at the United States Land Office at San Francisco in the State of California, and duly applied to the Register at said office to enter an adjoining farm homestead under the provisions of Sections 2289, 2290 and 2291 of the Revised Statutes of the United States, made affidavit before the Register of the United States Land Office at San Francisco, State of California, that he was then the head of a family, of the age of 56 years, and that he was a naturalized citizen of the United States, and that said application was for his exclusive use and benefit, and that the said entry of said land was made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person, and that said land was not mineral land, and that he was the owner of adjoining land upon which he was then residing, and that the amount of land applied for would not, with the land already owned by him, exceed in the aggregate one hundred and sixty acres. That thereupon he was permitted to and did enter an adjoining farm homestead; and that the Receiver of said Land Office issued to him a receipt a copy of which is appended to said cross-complaint, being a receipt of the fees of the Receiver, the sum of eight dollars being the fee and compensation of the Register and Receiver for entry of Lots 2 and 3 of Section 22 and Lot 1 of Section 27 in Township 2 North, Range 3 West, Mount Diablo Meridian, containing 70 25 acres.

And also alleged in said cross-complaint that said lands so entered as a homestead by this defendant were a portion of the lands described in the complaint in this action.

It was further shown and alleged in said cross-complaint that on the 13th day of December, 1883, D. C. S. McHarry, the plaintiff and respondent herein, filed a pre-emption declaratory statement in the said United States Land Office in San Francisco, alleging settlement on the 19th day of January, 1876, of a tract of land particularly in said cross-complaint described and being the same tract of land described in the complaint in said action.

It is further alleged in the said cross-complaint that the hearing of the conflicting claims of the said McHarry and this defendant to the lands sold aforesaid and entered by this defendant as a homestead was had before the Register and Receiver of the United States Land Office at San Francisco, and that the Register and Receiver of said Land Office decided said contest in favor of the

said McHarry on the 7th day of March, 1885; that on the 10th day of March, 1885, this defendant appealed from said decision to the Honorable Commissioner of the General Land Office, that the Commissioner of the General Land Office on the 1st day of September, 1886, rendered a decision in said matter reversing the decision of said Register and Receiver, and awarding the lands claimed by the defendant as a homestead entry to this defendant, that on the 6th day of November, 1886, said McHarry appealed from said decision of said Commissioner of the General Land Office to the Honorable Secretary of the Interior, that on the 16th day of September, 1889, the said Secretary of the Interior rendered a decision in said matter reversing the decision of the Commissioner of the General Land Office and awarding said lands so claimed by defendant as a homestead as aforesaid to the said plaintiff herein, D. S. C. McHarry, that thereafter on the 26th day of February, 1891, patent was issued to said plaintiff McHarry to the lands described in the complaint including the lands so as aforesaid claimed by this defendant as a homestead entry.

The defendant further alleged in the said cross-complaint that the said decision of the Secretary of the Interior was erroneous in point of law; that this defendant is entitled to the patent of the United States for the lands described in his cross-complaint as a homestead; and he prays that plaintiff might in said action be decreed to hold the legal title thereto in trust for this defendant and be required to convey the same to this defendant. The reasons for the said claim on behalf of the defendant are fully stated in the said answer and cross complaint, which is printed in full in the Transcript on Appeal herein now on file in this Court, and reference is hereby made to the said answer and cross-complaint as in said Transcript set forth for a greater certainty.

Defendant further alleges in said cross-complaint, that the entire claim of plaintiff was based upon the construction of Sections 2289, 2290 and 2291, and other Sections of the Statutes of the United States; that in the Court below the plaintiff filed a demurrer to said cross-complaint, which demurrer was sustained; and thereafter judgment went for the plaintiff in said action, from which judgment an appeal was taken and prosecuted to this Court, and this Court, by its judgment, affirmed the judgment of the Court below.

The only questions which were made and argued upon the said appeal were these:

First. Whether the ownership of the defendant and his title to the land owned by him on December 10th, 1883, were sufficient to entitle him to an additional farm homestead.

The second question submitted and decided by this Court was, whether defendant's residence on the adjoining lands owned by him on December 10th, 1883, was such as the law requires for the purpose of securing such additional homestead.

The third question argued and submitted was as to the construction on Sections 2289, 2290 and 2291 of the Revised Statutes of the United States as to the requirements of residence on lands entered as an adjoining homestead.

This Court held that under a proper construction of said sections

a five years residence after the entry of the land as a homestead was necessary in order to comply with the law; whereas this defendant claimed and now claims that under a proper construction of said sections a continued residence on either the land claimed as a homestead or the adjoining lands owned by the claimants is unnecessary; that all that is necessary to entitle him to a patent is proof of the cultivation of the land claimed as an adjoining homestead for the term of five years immediately succeeding the homestead entry.

Your petitioner shows by an inspection of the records in this case and the decision of this Court, that defendant in said action claimed right and title to said land described in his cross-complaint and the privilege to enter the same and receive patent therefor as an adjoining homestead under the statutes of the United States, and that the decision of this Court was against the title, right and privilege claimed by your petitioner under said statutes.

Wherefore, your petitioner prays that the honorable Court allow a writ of error from the Supreme Court of the United States to this honorable Court in accordance with the law in such cases provided, that the errors in said case, if any, may be re-examined, reviewed and corrected; and that the Court will issue such other process as will enable your petitioner to obtain a review of said cause of McHarry against Stewart by the Supreme Court of the United States; and that your Honor, the Chief Justice, will sign the citation herewith presented and accept and approve the bond and security herewith presented and fix the amount of the bond to be given as a supersedeas herein; that upon the acceptance of said security stay of all proceedings in the said cause be granted until the decision of the Supreme Court of the United States on said writ of error be made and certified to by said Supreme Court; and that upon filing said security, the Court to order the remittiter heretofore issued to the Superior Court of Contra Costa County to be withdrawn and returned this honorable Court.

THEO. WAGNER,
E. W. McGRAW,
*Attorneys for Petitioner.*

[Endorsed:] Filed Feb. 19, 1894.

L. H. BROWN, *Clerk.*
By G. E. MADISON, *Deputy.*

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*Order Allowing Writ of Error.*

In the Supreme Court of the State of California.

DANIEL S. C. McHARRY, *Respondent,*
*v.*
JAMES STEWART, *Appellant.*

In this cause the judgment of the Superior Court of the county of Contra Costa having been affirmed, it is now certified that in this suit and appeal the defendant James Stewart claimed title and right to and privilege to obtain patent for certain lands in his cross-complaint fully described as an adjoining homestead entry and by virtue of the provisions of the statutes of the United States, to wit, Sections 2289, 2290 and 2291, of the Revised Statutes of the United

States and other sections of the Statutes of the United States concerning the entry of homesteads; and the decision of this Court was and is against the title, right and privilege specially claimed by the defendant under said Statutes of the United States; wherefore, it is ordered that a Writ of Error be allowed from the Supreme Court of the United States to this honorable Court, in order that the decision of this Court in this case may be reviewed in accordance with law. By order of the Court.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

[Endorsed:] Filed Feb. 19, 1894.

L. H. BROWN, *Clerk.*
By G. E. MADISON, *Deputy.*

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*Bond on Writ of Error.*

In the Supreme Court of the United States.

JAMES STEWART, *Plaintiff in Error,*
*v.*
DANIEL S. C. MCHARRY, *Defendant in Error.*

Know all men by these presents, that we, James Stewart, as principal, and J. W. McClellan and L. C. Wittemeyer as sureties, of the county of Contra Costa, State of California, are held and firmly bound unto Daniel S. C. McHarry, of the county of Contra Costa, California, in the sum of Five Hundred ($500) Dollars, to be paid to the said Daniel S. C. McHarry, his executors or administrators. To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals.

Dated this fourteenth day of February, 1894.

Whereas, the above named James Stewart hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action, by the Supreme Court of the State of California.

Now, therefore, the condition of this obligation is such that if the above named James Stewart shall prosecute his said writ of error to effect, and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES STEWART. [SEAL.]
J. W. McCLELLAN. [SEAL.]
L. C. WITTEMEYER. [SEAL.]

UNITED STATES OF AMERICA,
State of California, County of Contra Costa.

J. W. McClellan and L. C. Wittemeyer, the persons whose names are subscribed as sureties to the above bond, being severally sworn, each for himself, says: That he is a resident of the State of California, and that he is worth the amount specified in the said bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. W. McCLELLAN.
L. C. WITTEMEYER.

Subscribed and sworn to before me, this 14th day of February, 1894.

[SEAL.] JAMES JOHNSON,
*Notary Public in and for the County of Contra Costa.*

STATE OF CALIFORNIA,
County of Contra Costa, *ss.*

I Joseph P. Jones, Judge of the Superior Court of the State of California in and for the county of Contra Costa, do hereby certify that I am acquainted with L. C. Wittemeyer and J. W. McClellan, sureties on the within bond; that they are residents of the county of Contra Costa; that I have examined them as to their qualifications to be sureties on the within bond and know from such examination and otherwise that they are abundantly qualified.

Witness my hand this 14th day of February, 1894.

JOS. P. JONES,
*Judge of Superior Court of Contra Costa County, State of California.*

The foregoing bond is hereby approved.

W. H. BEATTY,
*Chief Justice of California.*

Feb. 19, 1894.

[Endorsed:] Filed Feb'y 19, 1894.

L. H. BROWN, *Clerk.*
By G. E. MADISON, *Deputy.*

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*Order Fixing Amount of Supersedeas Bond.*

In the Supreme Court of the State of California.

DANIEL S. C. MCHARRY, *Respondent,*
*v.*
JAMES STEWART, *Appellant.*

Ordered that supersedeas bond to be given by James Stewart on his writ of error to Supreme Court of U. S. in above case be and the same is hereby fixed at $5,000.

Witness my hand this Feb. 19th, 1894.

W. H. BEATTY,
*Chief Justice Supreme Court of California.*

Filed Feb. 19, 1894.

L. H. BROWN, *Clerk.*
By G. E. MADISON, *Deputy.*

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*Supersedeas Bond.*

In the Supreme Court of the United States

JAMES STEWART, *Plaintiff in Error,*
*v.*
DANIEL S. C. MCHARRY, *Defendant in Error.*

Know all men by these presents, that we, James Stewart, as principal, and B. Fernandez and M. Lawliss as sureties, all of Contra Costa County, State of California, are held and firmly bound unto Daniel S. C. McHarry, of Contra Costa County, State of California, in the sum of Five Thousand ($5,000.00) Dollars, to be paid to the said Daniel S. C. McHarry, his executors or administrators. To

which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated this 24th day of February, 1894.

Whereas, the above named James Stewart hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action, by the Supreme Court of the State of California.

Now, therefore, the condition of this obligation is such, that if the above named James Stewart shall prosecute his said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES STEWART. [SEAL.]
B. FERNANDEZ. [SEAL.]
M. LAWLISS. [SEAL.]

UNITED STATES OF AMERICA,

State of California, County of Contra Costa. *ss.*

B. Fernandez and M. Lawliss, persons whose names are subscribed as the sureties to the above bond, being severally sworn, each for himself says: That he is a resident of the State of California and that he is worth the amount specified in the said bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

B. FERNANDEZ.
M. LAWLISS.

Subscribed and sworn to before me, this 24th day of February, 1894.

[SEAL.] R. H. LATIMER,
*Notary Public in and for the County of Contra Costa, State of California.*

STATE OF CALIFORNIA,

County of Contra Costa. *ss.*

I, Joseph P. Jones, Judge of the Superior Court of Contra Costa County, California, do hereby certify that I am acquainted with B. Fernandez and M. Lawliss, sureties on the within bond. That I have duly examined them as to their qualifications as such sureties, and know from such examination and otherwise that they are citizens and residents of Contra Costa County, California, and are abundantly qualified as such sureties.

JOS. P. JONES,
*Judge of Superior Court of Contra Costa County, California.*

[Endorsed:] The within bond approved by me this 20th day of March, 1894.

W. H. BEATTY,
*Chief Justice of the Supreme Court of California.*

[Endorsed:] Filed March 8th, 1894.

L. H. BROWN, *Clerk.*
By P. V. LONG, *Deputy.*

*Citation.*

UNITED STATES OF AMERICA,

State of California. *ss.*

To DANIEL S. C. MCHARRY:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be held at Washington on the seventeenth day in April next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of California, wherein James Stewart is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand this 19th day of February, A. D. 1894.

W. H. BEATTY,

*Chief Justice of the Supreme Court of the State of California.*

[Endorsed:] Service of within citation acknowledged this 7th day of March, A. D. 1894.

CHAS. E. WILSON,
WM. S. WELLS,

*Atty's for Daniel S. C. McHarry, Defendant in Error.*

[Endorsed:] Filed Mch 17, 1894.

L. H. BROWN, *Clerk.*
By A. W. JOHNSON, *Deputy.*

*Certificate of Clerk.*

In the Supreme Court of the State of California.

DANIEL S. C. MCHARRY, *Plaintiff and Respondent*,

*v.*

JAMES STEWART, *Defendant and Appellant.*

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing fifty-six pages numbered from 1 to 56 inclusive, contain a full, true and correct copy of the record and all proceedings, orders and opinions in the above entitled case, except the arguments and briefs of counsel, and that the same together constitute the return to the writ of error in said case, the original of which writ is returned with said record together with the original citation.

Witness my hand and the seal of the Supreme Court of the State of California, this day of , A. D. 1894.

[SEAL.] L. H. BROWN, *Clerk.*

By *Deputy Clerk.*

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No .....

JAMES STEWART,
Plaintiff in Error,
*vs.*
DANIEL S. C. MCHARRY,
Defendant in Error.

## BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

### STATEMENT OF CASE.

This is an action of ejectment to recover certain lands in Contra Costa County, California, commenced in July, 1891, by defendant in error against plaintiff in error in the Superior Court of Contra Costa County, California. The complaint was in usual form. (Trans., p. 3.) The answer of defendant consisted of a general denial and admission of possession of the demanded premises, and a cross-complaint admitting that the plaintiff in said action held a patent of the U. S. for the demanded premises, alleging that by virtue of the facts alleged in said cross-complaint, the plaintiff in the action held said premises as trustee for defendant therein, and praying for judgment that defendant had the equitable title and that plaintiff convey to him. (Trans., pp. 4 to 12.)

A motion to strike out portions of the cross-complaint was made by the attorney for plaintiff in said action, which was sustained in part and as to other parts was denied. (Trans., pp. 24-27)

The attorneys for plaintiff in said action also interposed a general demurrer to the cross-complaint, which demurrer was sustained. (Trans., p. 28.) Defendant in said action then refused to amend, the case was tried and judgment was rendered for plaintiff in said action. (Trans., pp. 28-9.)

Defendant in said action (plaintiff in error herein) duly appealed to the Supreme Court of the State of California, which affirmed the judgment of the Court below. (Trans., pp. 36-40.)

Plaintiff in error then sued out a writ of error from this Court which was duly allowed by the Chief Justice of the Supreme Court of California.

The cross-complaint in said action alleged the following facts:

That the land in dispute had been in the possession of James McClellan from 1865, until December 22, 1871, when he died, leaving surviving him a widow and two minor children, and the widow held possession of the land until the month of March, 1876, when she married James Stewart, the plaintiff in error herein. That in March, 1876, the plaintiff in error herein went into actual possession

of the demanded premises and has ever since remained in possession and used and cultivated the same. This land was reserved from settlement under United States Laws on account of unsettled private land grants which claimed to cover it, until April 16, 1883. James McClellan was an owner of the Pinole Rancho, owning an undivided interest therein, and in 1865 went into possession of a tract of land containing about two hundred and fifty acres, of which the land in dispute is a part. The boundaries of the Pinole Rancho were finally settled on August 22, 1868, and the land now in dispute was excluded from said boundaries and upon partition of said Pinole Rancho, McClellan was awarded the portion of the tract of land in his possession which was found to be within the boundaries of the Pinole Rancho as finally settled, but he continued in the possession of the part excluded to the time of his death. The land in dispute being excluded from the Pinole Rancho was thereafter claimed and reserved as a part of the Rancho El Sobrante, the boundaries of which were finally settled on August 11, 1883, and the land in dispute was then excluded from the boundaries of that rancho or private grant. On the 10th day of December, 1883, Stewart (plaintiff in error herein) entered the land in dispute as an adjoining farm homestead, and this entry was made upon the day the township plat was filed in the Land Office, and he was then the owner of and residing upon contiguous lands the area of which, together with that of the land in dispute, did not exceed 160 acres; the father of the defendant in error was for many years in possession of a large tract of land which became open to settlement and appropriation when these private land grants were finally setlled. His possession included much more land than he could hold or claim himself under the laws of the United States. But having provided a large family he and his children who had become of an age to entitle them to take up public land, proceeded to absorb the whole of the land theretofore in the possession of the father of the defendant in error, and as there was not enough to go around to give each the *maximum* quantity allowed by the United States Laws, they included in their respective claims subdivisions of public lands in the possession of their neighbors, and that was the case in this instance.

At the time this land was subject to appropriation under United States Laws, the defendant in error had but a short time before become of age, *i. e.*, twenty-one years old. His settlement is alleged about the time he became of age, January 19, 1878, his improvements and his whole settlement were of the flimsiest kind, merely such as to satisfy the minimum requirements of the law, if at all.

The defendant in error filed his Pre-emption Declaration Statement No. 17,834 on December 13, 1883, in which he alleged settlement January 19, 1878, and included in his claim the land entered by this appellant as an adjoining farm homestead, being the land in dispute herein.

On March 11, 1884, the defendant in error gave notice that he would offer final proof, and appellant was cited to appear and defend as to the part of the land claimed by him; the contest between them came to a hearing in the United States Land Office at San Francisco, before the Register and Receiver. On March 7, 1885, those

officers rendered a decision in the matter which is set forth in the cross-complaimt, marked "Exhibit C." (Transcript, p. 14.)

In that decision those officers state that Stewart, the appellant, claims ownership of the adjoining land on which his adjoining farm entry is based by virtue of a deed from his wife therefor; that the same is a part of the Pinole Grant and was a part of the estate of James McClellan, deceased, Mrs. Stewart's former husband, and was set apart as a homestead by the Probate Court for the support of McClellan's family, *and they decide that it is unnecessary to consider the other evidence in the contest* and that appellant acquired no right or title by his purchase from his wife of the land adjoining that entered by him, and that therefore his claim to the land entered by him as an adjoining farm homestead must be rejected and that in the absence of a valid adverse claim the land is awarded by them to McHarry, defendant in error.

From this decision Stewart, plaintiff in error herein, appealed on March 10, 1885, to the Commissioner of the General Land Office and the Register and Receiver thereupon forwarded the testimony taken before them in the matter with their decision and the papers in the case to the Commissioner of the General Land Office on October 30, 1885.

On the 1st day of September, 1886, the said Commissioner rendered a decision in the matter in which he reviewed evidence and found facts *from evidence which had not been passed upon at all by the Register and Receiver*, and he reversed the decision of those officers and awarded the land in dispute to Stewart, the plaintiff in error herein. This decision is also set forth in the cross-complaint as "Exhibit D." (Transcript, p. 15.)

From this decision McHarry, defendant in error herein, appealed on November 6, 1887, to the Secretary of the Interior, which appeal was forwarded by the Register and Receiver on January 15, 1887, and on the 16th day of September, 1889, the Secretary of the Interior rendered a decision in the matter in which he reviews evidence taken before the Register and Receiver in the matter, *which was not considered by those officers*, and found facts therefrom and reversed the decision of the Commissioner of the General Land Office, and awarded the land in dispute to McHarry. This decision is also set forth in the cross-complaint as "Exhibit E." (Transcript, p. 17.) Patent of the U. S. for the land in dispute issued to McHarry Feb. 26, 1891.

The cross-complaint further alleges that Stewart (plaintiff in error herein) has, since 1882, maintained his residence on his original farm and has maintained his actual possession of the land in dispute and has cultivated both tracts for more than five years succeeding his homestead entry of the land in dispute; that he has not alienated any portion of said land; that he has at all times been ready since the expiration of said five years to pay any further fees and commissions required by the homestead laws, but has been prevented from doing so by reason of the fact that his said homestead entry was canceled by said order of the Secretary of the Interior.

A full statement of the contents of the cross-complaint could be made only by reproducing it in its entirety. We have given its gen-

eral scope; other more particular allegations will be noticed hereafter.

SPECIFICATIONS OF ERROR.

1st. The Supreme Court of California erred in affirming the judgment of the Court below.

2nd. It erred in its construction of Section 2273 of the Revised Statutes of the United States wherein it held that on appeal from the Register and Receiver, the Commissioner of the General Land Office, and on appeal from him the Secretary of the Interior had power to pass upon questions of fact not passed upon or decided by the Register and Receiver.

3rd. It erred in its constructions of Sections 2289, 2290 and 2291 of the Revised Statutes of the United States wherein it held that under such sections a continued residence upon the original farm was necessary to enable an owner thereof to prove up and obtain patent for an adjoining farm entry.

4th. It erred in holding that the cross-complaint of plaintiff in error filed in said Superior Court of Contra Costa County was insufficient, and that the said Superior Court did not err in sustaining the demurrer thereto.

ARGUMENT.

Upon the demurrer to the cross-complaint six questions were raised:

1st. Whether Stewart's (plaintiff's in error) ownership of original farm was sufficient to sustain an adjoining farm homestead entry.

2nd. Whether the Commissioner of the General Land Office and the Secretary of the Interior, in the exercise of their appellate jurisdiction, had the power to decide questions of fact, not passed upon or decided by the Register and Receiver.

3rd. Whether land in the lawful possession and within the enclosure of one person can be entered or acquired in connection with other land under the pre-emption laws by another person.

4th. Whether residence for five years is required by the provisions of the homestead laws in cases of adjoining farm homesteads.

5th. Whether the allegations of imposition and fraud in the cross-complaint alleged against McHarry put in issue the character and good faith of McHarry's settlement and entry.

6th. Whether the determination of the Secretary of the Interior was conclusive upon the State Court.

I.

THE JURISDICTION OF THE SECRETARY OF THE INTERIOR.

*First, Second and Fourth Specifications of Error.*

It appears from the cross-complaint and the exhibits attached thereto that when defendant in error, McHarry, appeared before the Register and Receiver to prove up his claim under his pre-emption, the plaintiff in error contested his right to a patent. The primary question before the Register and Receiver was whether McHarry had complied with the pre-emption laws. It is an admitted fact in the case that he had not; that his declaration covered lands in the actual adverse possession of Stewart, for many years under fence and culti-

vation. It would have seemed that that admitted uncontested fact would have been sufficient to end the contest. Not only was the fact uncontested, but the law of the case had been many times adjudicated by this Court. It was settled by the decisions of this Court that a pre-emption claim could not be established on lands in adverse possession of another who held under a claim of right from the U. S.

Atherton *v.* Fowler, 96 U. S. 513.
Hosmer *v.* Wallace, 97 U. S. 576.

But the Register and Receiver did not render any decision whatever on the primary question, on which it was their duty to decide, to wit, the right of McHarry to pre-empt the lands in question, but, on the contrary, *assumed* that he had that right in the absence of any valid adverse claim.

This most extraordinary decision of the Register and Receiver is found on page 14 of the transcript.

The Register and Receiver decided only one question before them, to wit, the question whether Stewart when he made his homestead entry was the owner of contiguous lands, and either through want of capacity to understand, or by wilful misconstruction of a decision of the Supreme Court of California, held he was not such an owner.

Now the questions before the Register and Receiver were these: 1st. Was McHarry's entry of the lands in question regular, giving him rights under the laws of the United States?

That was the primary question before them—all others were secondary and no attempt was made to solve that question. A solution of it in accordance with the decisions of this Court would have put an end to the claim of McHarry.

The other questions before them were secondary, and were as follows:

2nd. Was Stewart at the time he made his homestead entry, an owner of adjoining lands? This question, by reason of an absurd interpretation of a decision of the Supreme Court of California, was decided against Stewart.

3rd. Was Stewart at the time of his entry residing upon lands, claimed to be owned by him, adjoining his homestead entry? This question the Register and Receiver did not attempt to decide.

4th. Did Stewart prior to the pre-emption of McHarry make in due form of law a homestead entry on the lands in question? This question was not answered by the Register and Receiver.

Stewart appealed from the decision of the Register and Receiver to the Commissioner of the General Land Office.

Now from what was that appeal taken, and what powers did the appeal confer on the Commissioner of the General Land Office?

Sec. 2273 of Revised Statutes reads as follows:

"When two or more persons settle on the same tract of land the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provisions of the law; and *all questions* as to the right of pre-emption arising between different settlers shall be determined by the Register and Receiver of the district within which the land is situated; and appeals from the

*decision* of the district officers, in cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

This statute is a requirement that the Register and Receiver shall make special findings as to all questions involved, which findings constitute the decision, from which an appeal lies.

The rules of the Land Department are in harmony with our construction of the statute. They are as follows:

"Rule 37. The Register and Receiver will be careful to reach, if possible, the exact condition and status of the land involved in any contest, and will ascertain *all the facts having any bearing upon the rights of parties in interest.*

"Rule 38. In pre-emption cases they will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming as pre-emptors; the steps taken to mark and secure the claim, and the exact status of the land at that date as shown upon the records of their office.

"Rule 39. In like manner, under the homestead and other laws, *the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.*"

We submit that under the law and the construction of it by the Land Department, as shown by its rules, it was the duty of the Register and Receiver to make a special finding as to every material fact and the power of review on appeal to the Commissioner of the General Land Office or from him to the Secretary of the Interior, is limited to a review of the findings which were in fact made by the Register and Register.

It is true that under the general power conferred upon those officers by Secs. 161, 441, 453 and 2478 they have a supervisory jurisdiction over their subordinates, but that jurisdiction is separate and distinct from their appellate jurisdiction. In the case of Cornelius *v.* Kessel, 128 U. S., this Court holds that this power is not unlimited or arbitrary and that it can only be exercised when the entry is made upon false testimony or without authority of law. In the case of Lee *v.* Johnson, 116 U. S., the same doctrine is laid down. In that case this Court sustains the action of the Secretary under his supervisory power, but upon entirely different grounds, viz.: that the party contesting showed no equity in himself and that to sustain him would aid an attempted fraud. The Supreme Court of Michigan in that case decided directly upon this point under discussion, viz.: that the decision of the Secretary was only appellate and not original and that his decision upon a matter not decided by the Register and Receiver was inconclusive, and this Court in that decision upon this point states:

"While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the Courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions."

Thus intimating that while the Supreme Court of Michigan was correct in its rulings in a general way that in a case like that before the Court where *fraud is attempted*, the Secretary under his other supervisory jurisdiction had the power to cancel the entry *and that equity can not be invoked to aid a fraud.*

This practically restricts the exercise of that supervisory power, to cases where the entry is fraudulent or illegal upon its face, or is conclusively shown to be so in the contest, or to exparte cases.

There is no pretense that the entry of Stewart was in any sense fraudulent and upon the face of it, and in fact and in law, it was a legal entry and no competent evidence, nor any evidence, was properly brought before the Land Department which in the slightest degree impeached the entry.

There was then in this case no occasion for the exercise of that supervisory power and in other respects there were only the questions before either the Commissioner or Secretary, upon appeal to them, which were decided by the Register and Receiver.

We appealed from the decision of the Register and Receiver, alleging as error, among other things, refusing to consider evidence as to residence and allegations of violence. It was our right to have these questions considered by those officers. We did not ask to have them considered by some other officer, nor could any other officer by way of appellate jurisdiction perform the duties which the law required the register and receiver to perform. The question of residence and collateral questions arising from it, are questions between the different settlers and the law, and the rules of the Department distinctly require that *all* such questions *shall* be determined by the Register and Receiver of the district within which the land is situated, and it gives the Commissioner and Secretary only appellate jurisdiction in regard to such questions. From this it follows necessarily that those officers can not consider evidence on appeal and find facts from it, which was not passed upon by the Register and Receiver in the first instance, and if they do, the evidence is not properly before them and therefore their decision is not conclusive thereon. In all the numerous authorities, which go to establish the conclusiveness of findings of fact by the officers of the Land Department, there is in each one the qualifying clause of "*evidence properly before them.*" This is not a mere technical point. The Land Department of the United States is a very peculiar tribunal; there is no process for compelling the attendance of witnesses there—a poor claimant sometimes has but little opportunity to get his witnesses—and there is no limit or restriction to the kind and amount of evidence that may be introduced, except that it is expensive (22½ cents per folio), and that it must all be written out. In a contested case pending on appeal the evidence of the best citizen is no better than that of the most unworthy, for both will look alike on paper, and oftentimes that of the most unworthy looks the best on paper.

That it is at best a tribunal poorly adapted for the purposes for which it is intended, is a fact patent to every one who has knowledge of its practical workings. Mr. Justice Deady, in the Oregon

Circuit, expressed the common feeling of the profession as to land office investigations, when in Wilson *v.* Fine, 40 Fed. Rep., 55, he said:

"If upon inquiry the land office finds that through fraud or mistake a certificate was improperly issued, a suit should be brought in the proper court to set aside and cancel the same. Such a suit is quite as simple and inexpensive as a hearing in the Land Department, *and much more likely to be attended with correct and satisfactory results.*"

Mr. Justice Hanford in the Washington Circuit Court expressed a like distrust of those tribunals. He said:

"No person will seriously contend that any scheme to obtain title "to land from the government by fraud, or without full compliance "with the requirements of the land laws, ought to succeed or be "protected by the courts; and, on the other hand, the thought of "judicial protection to fraud is not more abhorrent to an honest "mind than the idea that an honest settler upon public land, who, "in good faith, has fully performed all the conditions prescribed "by law, and paid the government in full its price for a tract of "land, can be convicted of fraud, and on that ground subjected to "the loss of the land and the forfeiture of the money paid therefor, "without a trial or opportunity for defending against an unjust ac-"cusation *other than a contest in the land department.* In such pro-"ceeding, the officers have no power to issue process to bring the "witnesses necessary to establish the truth, and the only evidence "that can be produced is that of willing or paid witnesses; and the "manner in which such contests are conducted involves such enor-"mous expense that an honest man of moderate means cannot rea-"sonably hope to prevail against an adversary possessed of greater "wealth and not incumbered with a conscience."

Stimson *v.* Clarke, 45 Fed., 760.

We submit that such a tribunal should be held to a strict observance of the law which gives it jurisdiction, and of its own rules formulated in accordance with that law. The statutory requirements for the insurance of justice are lamentably deficient, and each of the few safeguards which Congress has interposed between a litigant and a careless, unconsidered and unjust judgment, should be maintained. And as both the law and the rules require the Register and Receiver to pass upon *all* the questions in the case, it should be held that, in the first instance their power is exclusive, and that appellate power is limited to a review of their findings of fact and conclusions of law.

That provision of the law is not only beneficent, but it is indispensable to an orderly and logical endeavor to arrive at truth and justice. The Register and Receiver are the only officers who see the witnesses and who are competent to judge of their veracity. There is no appellate court that does not view with the utmost respect the finding of a *nisi prius* Court on questions of fact; none that will reverse them unless they are clearly contrary to the very great preponderance of evidence.

The Richmond, 103 U. S., 540.
The Juniata, 93 U. S., 337.

It has been held by Assistant Secretary Chandler that the same rule applies to the appellate decisions of the Secretary of the Interior.

Scott *v.* King, 9 L. D., 299.

And in other cases it has been held that the decision as to facts of the local land officers, *who had the witnesses before them*, is entitled to special consideration.

Austin *v.* Thomas, 2 Capp Land Laws (1890) 768.

Morfey *v.* Barrows, 4 L. D., 135; 12 C. L. O., 172.

The law evidently contemplated that the Register and Receiver should decide upon the relative credibility of the witnesses, and that the Commissioner and Secretary should exercise their appellate jurisdiction in harmony with the general principles of the jurisprudence of the country, and in a similar manner, so far as practicable, as other appellate tribunals exercise their jurisdiction, and the law plainly says so.

The Register and Receiver found only two facts.

1st. That the declaration of McHarry covered land in the actual possession of other parties.

That finding should have ended the case against McHarry as to the lands in question.

2nd. That Stewart claimed ownership of the adjoining land by virtue of a deed from his wife therefor; that said land was part of the Pinole grant and was part of the estate of McClellan. Mrs. Stewart's former husband, and was set apart as a homestead by the Probate Court for the support of McClellan's family.

From which last fact the Register and Receiver conclude that as a matter of law Stewart got no title by deed from his wife as decided by the Supreme Court of California in Matter of Estate of Moore, 57 Cal., 437. In fact, the decision cited had no more relevancy to the question at issue than would any case selected at random from any published reports.

The Register and Receiver further reported that there was "a large amount of testimony in relation to Stewart's residence and the trouble between Stewart and the McHarry family," which it was unnecessary to consider,—quite ignoring the fact that the statute of the U. S. and the rules of the Land Department made it their duty to consider it and pass upon it.

On appeal from the decision of the Register and Receiver the Commissioner of the General Land Office, not noticing the finding of the Register and Receiver that McHarry had declared upon the land in question while it was in adverse possession of and covered by homestead entry of another, very properly reversed the decision as to the utterly indefensible conclusion arrived at by the Register and Receiver as to Stewart's title. Thereupon it was his manifest duty to remand the case to the Register and Receiver with instructions to make findings as to *all* the facts in the case, but instead of doing so, he, without authority of law, assumed the duties of the Register and Receiver, and himself passed on the facts as a tribunal of original jurisdiction over them, and the Secretary of the Interior on appeal repeated the error of the Commissioner.

We respectfully submit that all the proceedings before the Land

Department subsequent to the reversal of the decision of the Register and Receiver were without authority of law and in no way conclude a court of equity from an investigation of the truth.

We have assumed for the purposes of this argument that Section 2273, R. S., confers power on the Register and Receiver to hear and determine a contest between a homestead enterer and a subsequent pre-emptor. In fact, we are of the opinion that it confers no such power.

## II.

### The Register and Receiver had no Jurisdiction in this Case.

*First, Second and Fourth Specifications of Error.*

The only jurisdiction which the Land Department has in contests between claimants for public lands is statutory, and there is no statute which empowers the Register and Receiver to annul a homestead entry or to hear and decide any contest between a pre-emptor and a prior homestead enterer.

The only section under which such power is claimed is Sec. 2273, R. S., which provides:

"When two or more persons settle on the same tract of land the "right of pre-emption shall be in him who made the first settlement, "provided such person conforms to the other provision of the law; "and all questions as to right of *pre-emption* arising between differ- "ent settlers shall be determined by the Register and Receiver," &c., &c.

It is thus seen that by the precise terms of the law the power of the Register and Receiver to hear and pass upon contests is confined to contests between *pre-emption* claimants and does not extend to *homestead* claimants. The marked difference that exists between the status of one who has filed a pre-emption declaration and one who has made a homestead entry affords a sufficient reason why the power in terms conferred upon the Register and Receiver by the statute should not be extended by construction so as to give them a like power with respect to homestead entries.

A pre-emption declaration gives no vested right whatever against the United States. Notwithstanding such declaration the government may dispose of the lands as it pleases. The pre-emption laws do not enter into any contract with the settler.

The Yosemite Valley case, 15 Wall., 77.

As between persons not yet having any kind of a title to the land, Congress has given to the Register and Receiver in the first instance the power to decide which of them should be allowed to purchase the land from the United States. Whether Congress would have the power to vest in the Land Office or any branch thereof the jurisdiction to conclusively decide between the claims of the enterer of a homestead and the subsequent claim of one who desires to pre-empt the land, is a question which does not yet arise, as Congress has never attempted to exercise such power.

A homesteader after entry has in fact purchased. His entry, which is made by making and filing an affidavit and paying the sum required by law, is a contract of purchase, which gives him an inchoate title to the land, which is property. This is a substantial

and vested right which can only be defeated by his failure to perform the conditions annexed. It is true no certificate or patent can be issued until the expiration of five years from the date of entry, the United States retaining the legal title to insure performance of those conditions. But the vested right of the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of law.

Red River, &c., Ry. Co. *v.* Sturr, 32 Minn., 98.

The enterer of a homestead is in a very different position from one who merely declares his intention to effect a pre-emption. He has an inchoate title—an equitable title—a vested interest—which cannot be divested by any subsequent congressional legislation, but only by his subsequent failure to comply with the homestead laws.

Opinion of Att'y Gen'l McVeagh, 1 Copp's Land Laws (1882), p. 388.

The only interest and right the government retains in said lands is a right to prevent waste, until the right of the enterer is defeated by subsequent failure on his part to comply with the requirements of the law.

U. S. *v.* Turner, 54 Fed Rep., 228-230.

The homestead laws and entry under them constitute a contract between the government and the individual, after which the government has the same rights and no other, that an individual contracting to sell land and putting the vendee in possession would have.

U. S. *v.* Ball, 31 Fed., 667.

One desiring to make entry of a homestead is required by Section 2290 to make a certain affidavit, and upon making and filing such affidavit and payment of specified fees the section says "he shall "thereupon be permitted to enter the amount of land specified."

The making of a false affidavit is perjury.

Doubtless the Register and Receiver might refuse to allow a homestead entry to be made, notwithstanding the requisite affidavit was filed, if good reason existed therefor, such for instance as the existence of a previous entry on the same land; the fact that the applicant had previously exhausted his rights of homestead entry, or that in other respects his affidavit was false and fraudulent. If they allow the entry they must report same with full particulars to the General Land Office. (See Sec. 2295, R. S., and General Circular of Jan. 1st, 1889; 1 Copp (1809), 18.)

Doubtless the Secretary of the Interior, for like good reasons appearing on the face of the papers before him, could on the report from the Register and Receiver cancel any entry allowed by the local officers. A homestead entry could not well be said to be final until having been reported to the General Land Office it passed the ordeal of examination there.

But after it is once finally allowed the right to acquire absolute title to the land upon subsequent compliance with the requirements of law is a vested right which neither the Register nor Receiver nor the Secretary of the Interior has power to take away.

It was held in 1885 by the U. S. Circuit Court, District of Ore-

gon, that under the pre-emption law the certificate of purchase gave the pre-emptor a vested interest in the lands, of which he could not be deprived by the Land Department for alleged fraud in obtaining it; that in such cases the government must seek its redress in the courts.

Smith *v.* Ewing, 23 Fed., 741.

This case was followed in

U. S. *v.* Reed, 28 Fed., 485.

Jones *v.* U. S., 35 Fed., 562.

The latter case was that of a timber land entry, the statute concerning which provides that if the affidavit for entry be false the affiant is liable to punishment for perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same.

The Court said: "If it is claimed that the certificate was fraud-"ulently or illegally obtained the Land Department cannot arbitra-"rily, or at all, cancel the same or set it aside. The certificate and "the right of the purchaser thereunder, is property of which he "cannot be deprived without due process of law, and mere fiat law, "by whomsoever pronounced, can have no such effect. Redress "must be had in the Courts, where such matters are properly cog-"nizable, and where they may be heard and determined according "to the law of the land—the law applicable to the rights and obli-"gations of private persons under like circumstances."

These cases were again re-affirmed by the same Court in

Wilson *v.* Fine, 40 Fed., 52.

This was a case where a final certificate under the homestead law was canceled by the Register and Receiver after notice to and hearing of the claimant on the ground that the claimant was not qualified to make the homestead entry in question, because he had previously exhausted his rights under the homestead laws.

The Court said:

"All applications for entries of land under the Homestead Act "are noted on the books and plats of the District Land Office, and a "register kept of the same. These facts, 'together with the proof "upon which they have been founded,' are returned to the General "Land Office. (Section 2295, Rev. St.) When it appears *from "such return, together with the record of the surveys of the public "lands, and the prior disposition thereof in the General Land Office,* "that an entry has been allowed in the District Land Office con-"trary to law, the Commissioner has power, and it is his duty, to "correct the error and disallow the entry.

"But if, *after the entry is made*, and the certificate is issued, some "one should offer to enter the same land on the ground that the "first entry is illegal, and propose to show the same by new and "extraneous proof, I can find no law that authorizes the Register "and Receiver, or the Commissioner, to institute or direct a 'pro-"ceeding' to hear and determine the matter, and therein set aside "or cancel the entry and certificate. The subject is no longer "administrative in its character. It ceased to be so, so far as the "Register and Receiver are concerned, when, upon the final proof,

" after notice to the world of the settler's five years' residence and " cultivation, the certificate was issued to him.

"Admitting the power of the Commissioner to disallow an entry for " reasons *appearing on the face of the return* made by the Register " and Receiver concerning the same, thereafter and otherwise, the " validity and effect of the certificate as evidence of the right of the " settler to the land described therein can only be impeached in a " judicial proceeding.

"If, upon inquiry, the Land Office finds that through fraud or " mistake a certificate was improperly issued, a suit should be " brought in the proper court to set aside and cancel the same. " Such a suit is quite as simple and inexpensive as a hearing in the " Land Department, and much more likely to be attended with cor- " rect and satisfactory results."

These cases were again followed and the principle announced, reiterated by the same court in

American Mortgage Co. *v.* Hopper, 48 Fed., 47.

All the foregoing cases cited from Federal Reporter were decided by Judge Deady and, as appears by his decisions, after a very careful examination of the decisions of this Court bearing upon the point. Without citing these cases, Judge Hanford in the Washington Circuit arrived at precisely the same conclusion in

Stimson *v.* Clarke, 45 Fed., 760.

It is significant that the government, though a party to U. S. *v.* Turner, 54 Fed., 228, which held that the government held a contract relation with the enterer of a homestead, and that its rights and obligations were governed by the laws relating to private vendors and vendees, and was also a party to the suits of the U. S. *v.* Reed, 28 Fed., 485, and Jones *v.* U. S., 35 Fed., 562, in which it was held the Land Department had no power or jurisdiction to cancel or annul an entry, the law officers of the government seem to have been satisfied with the decisions of the Court in these cases and prosecuted no appeal therefrom.

This precise point has not been before this Court, but as far as this Court has had occasion to adjudge upon the nature and attributes of a homestead entry, its decisions are, in the same line of reasoning, as those of Judge Deady, above noted. Thus in Hastings & Dak. R. R. Co. *v.* Whitney, 132 U. S., 357, this Court says:

" Under the homestead law three things are needed to be done " in order to constitute an entry on public lands: First, the appli- " cant must make an affidavit setting forth the facts which entitle " him to make such an entry; second, he must make a formal appli- " cation; and third, he must make payment of the money required. " When these three requisites are complied with, and the certificate " of entry is executed and delivered to him, the entry is made—the " land is entered. If either one of these integral parts of an entry " is defective, that is, if the affidavit be insufficient in its showing, " or if the application itself is informal, or if the payment is not " made in actual cash, the Register and Receiver are justified in re- " jecting the application. But if, notwithstanding these defects, " the application is allowed by the land officers, and a certificate of " entry is delivered to the applicant, and the entry is made of

"record, such entry may be afterwards canceled *on account of these* "*defects* by the Commissioner, or on appeal by the Secretary of the "Interior; or, as is often the practice, the entry may be suspended, "a hearing ordered, and the party notified to show by supplemental "proof a full compliance with the requirements of the department; "and on failure to do so the entry may be canceled. But these "defects, whether they be of form or substance, by no means "render the entry absolutely a nullity. So long as it remains a "subsisting entry of record, whose legality has been passed upon "by the land authorities and their action remains unreversed, *it is* "*such an appropriation of the tract as separates it from the public* "*domain.*"

It may be claimed that there is a distinction between the case at bar and that of Wilson *v.* Fine, *supra*, arising from the fact that the latter case concerned a final certificate, on which a patent might be issued, while in this case we have only the original entry. But such claim, if made, has been already passed upon by this Court, In Sturr *v.* Beck, 133 U. S., 541, this Court, quoting Witherspoon *v.* Duncan, 4 Wall., 218, says: "It may be said this language refers to the certificate issued on final proofs, but if the word 'entry,' as applied to appropriations of land, 'means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim' (Chotard *v.* Pope, 12 Wheat., 588), the principle has a wider scope."

We respectfully submit that the present case is fully covered by the citations we have made. Our client made a homestead entry, duly allowed by the land officers of the government; by such allowed entry the government contractad with him to convey to him the lands upon subsequent compliance with statutory requirements; the Secretary of the Interior assumes the power to set aside that contract on the ground that the entry was not in good faith, and that our client was not qualified to enter the lands. We submit that our entry having been in due form and properly allowed, that the government through its own agents cannot set aside or annul the contract it entered into, but that if there are grounds for such setting aside or annulment, the government, like a private individual, must seek the aid of its courts, and that the Land Department was without jurisdiction in the premises.

Upon only one point can the provisions of Sec. 2273, which provides only for contests between pre-emptors, be properly extended by judicial construction, to a contest between a pre-emptor and a homestead claimant, and that is as to *priority* of right. A settler on public lands is allowed a certain time after filing the township plat to make his declaration; during that time the land may be entered as a homestead; if the prior settler, within the time limited, subsequently files his declaration of pre-emption he has the prior right, and the determination of that question would in no way impugn the ruling of the Register and Receiver when they allowed the homestead entry; but beyond that we submit the officers of the land office certainly cannot go. In this case the record shows that the prior right was in Stewart. McHarry never has been in possession of the lands. Stewart was in possession of them the seven years

preceding his homestead entry, and he made his homestead entry three days before McHarry filed his pre-emption declaration.

Section 2297, R. S., hereafter quoted, affords the only authority that is given to the Land Department to cancel or set aside a homestead entry duly made and allowed. As we hereinafter shown that part of that section relating to change of residence could not, as a matter of fact, apply to this case, and as a matter of construction does not apply to any adjoining farm homestead. The only other ground is that of abandonment named in that section.

It results from this condition of the law that if after a man has entered a homestead some one subsequently makes a declaration of pre-emption covering the same ground, and gives notice of making final proofs and applying for certificate of entry—the only question before the land officers is as to which of the two had the prior right and as we have shown that is not always to be determined by the priority in point of time of the homestead entry to the pre-emption declaration. But being determined, and in this case it is admitted, that the homestead entry was the prior right, nothing is left to the land officers but to refuse the pre-emptioner's application for a certificate and then the pre-emptioner can take no further steps unless and until the homestead entry is duly cancelled under Section 2297, U. S., or until the homesteader offers to make final proofs. When he does so the sole question is whether he has complied with the law subsequent to his entry.

As to fraud in the original entry, that is a question in which only the government is interested, and if it desires to set aside its contract with the homestead enterer it must apply to the Courts like any other vendor.

## III.

### Decision of Secretary of Interior.

*First, Third and Fourth Specifications of Error.*

This decision as appears in the record embraced two points:

1st. That under the facts in the case, which, as to that branch of the case, are correctly stated, Stewart did not obtain title to the original farm by deed from his wife. It will not be disputed that the adjudication of the Secretary of the Interior upon a conclusion of law arising from admitted facts is open to correction by a court of equity in this case, and his legal opinion on that point will be considered under a separate specification. The greater part of the decision of the Secretary of the Interior is occupied by a discussion of that question.

After such discussion he adds (Trans., p. 22):

"There is still another fatal objection to Stewart's entry. The "Statute requires *residence* on the original farm. The proof shows "that Stewart and his family, while making a show of residence on "the tract claimed as an original farm, had in fact leased said farm "to a tenant for a number of years, covering the period of his ad-"joining farm entry, and that they in fact resided several miles "from said farm in the town of Martinez, where Stewart had an "established, permanent business and a residence connected with "his place of business. The excuse set up by Stewart for such

" non-residence, namely, that it was because of danger of violence " and injury at the hands of the McHarrys, is not sustained by the " evidence. Mrs. Stewart hereof testifies, that she went to the " farm and remained there for short periods, whenever she felt " inclined, and seems never to have been molested, and no attempt " by the McHarrys to prevent Stewart or his family from residing " on the original farm at any time is shown."

If the Court holds with us that the questions in the above extract from the decision of the Secretary of the Interior were not properly before him by reason of his lack of jurisdiction over the subject matter or by reason of the failure of the Register and Receiver to pass upon them, then his decision on those matters is certainly so much waste paper.

But it is not conclusive in Courts of Equity for other reasons.

It fails to decide the exact point which it should have decided, to wit, whether or not on the day Stewart made his homestead entry he was a resident on the adjoining farm.

Section 2289, R. S., provides that every person owning and residing on land may enter contiguous land as a homestead, providing both tracts shall not exceed in area 160 acres. The date of ownership and residence required is the date of the entry of the adjoining land. The statute does not *require* ownership or residence a single hour before the entry is made, though under the statute of 1880, hereinafter referred to, a previous residence is advantageous.

As to a pre-emption entry under Sec. 2259 the Circuit Court of Appeals in the 8th Circuit, in a recent case, said:

" Section 2259 does not require that the pre-emptor shall have " been qualified to enter the land for ten months, or for any length " of time, before his purchase. It is sufficient if he has filed his " declaration to become a citizen *an instant* before he enters and " pays for the land."

Bryan *v.* Edinburgh A. L. M. Co., 63 Fed., 196.

And to like effect are the decisions of the land department.

" This Department has repeatedly held that residence may be " established *the instant* that a claimant goes upon a tract of public " land for that purpose (Goodright *v.* Anderson, 2 L. D., 624; Grin- " shaw *v.* Taylor, 4 L. D., 350). Nor does it necessarily follow " that a claimant must abandon the business in which he is en- " gaged in order that he may acquire title to land under the pre- " emption law (Henry *v.* Buckman, 3 L. D., 223).

" U. S. *v.* Skahen, 6 L. D., 121, by Acting Sec'y Muldrow."

So as to entry of adjoining farm homestead, the time when the enterer must be qualified is at the *instant of the entry*, not before or after. It is then that he must be the owner of, and resident upon land, to which his entered homestead adjoins.

The question of Stewart's residence at the instant he made the adjoining farm entry is not decided. What is a man's residence s a mixed question of law and fact. It depends very much upon the *intention* of the party.

So far as the opinion of the Secretary purports, in an indefinite and uncertain manner, to state facts, such facts are in no way inconsistent with a residence upon the land by Stewart at the time he

made his homestead entry. Construing his opinion in this case with that of Secretary Teller in Higgins *v.* Wells, 3 Land Dec., p. 22, it is apparent that the few alleged facts in Secretary Noble's decision are entirely insufficient to warrant the conclusion that Stewart was not at all times a resident on his original farm, and even Secretary Noble does not draw the conclusion that he was not a resident at the time he made his homestead entry.

The decision of Secretary Teller referred to reads as follows:

"It is urged, however, that Well's family only visited the land "during the summer, remaining at the county seat during the "winter, where he had a house and kept most of his furniture. "This I think a mere refinement in argument. The homestead law "is a practical law, and is so devised that it may have a practical "enforcement. The law itself provides its own evidence of good "faith in improvement, cultivation and residence; if these exist as "facts, the law is satisfied. *If the things done on the land are sufficient to warrant good faith, we must infer good faith; and we may "not go off the land and find a fact elsewhere, from which we may infer "bad faith.* For example, if a claimant has a hundred dollars' "worth of furniture on his homestead, and two hundred dollars' "worth in a house that he occupied before he took the homestead, "it would be absurd to infer bad faith from the latter fact. So, if "he own a house in a town, wherein he lived before entering his "homestead, and which he retains and visits periodically for pur"poses of business or pleasure, his good faith is not thereby "impeached. The extra furniture and the extra land are not "forbidden by anything in either the letter or spirit of the home"stead law."

And to like effect is the decision of Secretary Teller in Humble *v.* McMurtrie, 1 Copp's Land Laws (1890), 463, wherein he says:

"Your decision, however, holds that as 'it is shown that Mc"'Murtrie was Collector of Customs of the District of Minnesota "'at the time he made his entry, and as Sec. 2596, R. S. of the "'U. S., provides that such officer shall reside at Pembina, it is "'presumed that his residence could not be on the land embraced "'in his entry.' While this is true as to the *personal* residence to "which the statute refers, it is erroneous as to a *legal* residence, "which most officials of the U. S. maintain apart from their per"sonal residence. The statute is not to be construed as requiring "a person to spend every minute, day or week, of his official life at "Pembina; hence he may in good faith leave his official business "for the purpose of establishing his home, his *legal residence*, on a "tract of land whereon he *proposes* to place his family, and to re"main with them from time to time. Therefore it does not neces"sarily follow from the statute cited that McMutrie did not estab"lish a *legal* residence on his homestead, and, as that was the con"test charge, the entry should not be canceled."

The Secretary in this case refrained from stating facts material on the question of residence. In cases of disputed residence under

the land laws, the place where the party *votes* is always deemed most significant, and often of controlling importance.

*In re* Geo. T. Barnes, 4 L. D., 62, decision of Secretary Lamar.

Grove *v.* Crooks, 7 L. D., 141-3, decision by Acting Secretary Muldrow.

Lee *v.* Johnson, 115 U. S., 52, 53.

The decision of the Secretary is very far short of being a sufficient finding of facts as to residence. It is a mixed conclusion of fact and law.

The character of the findings with respect to the residence of Stewart is very similar to those brought to the attention of the Court in Stimson *v.* Clarke, 45 Fed., 760. The findings in that case were as follows:

"*First.* That the said Curley had not made his filing, application and entry in good faith to appropriate the land to his own use and benefits, as required by law.

"*Second.* That the said Curley had not made the necessary residence, cultivation and improvement to entitle him to enter said land."

Concerning that class of findings, the Court held that they did not preclude inquiring into the facts.

The Court said (p. 763):

"The Supreme Court has never yet decided that in a contest proceeding instituted after an inquiry has been allowed, in which there is a conflict of evidence, the Commissioner can make a decision adverse to the entry upon a mere preponderance of evidence, *or that any decision of the commissioner, stated merely in general terms, or as an ultimate conclusion to the effect that a party has not in good faith complied with the law so as to be lawfully entitled to make the entry*, is such a decision as to justify the canceling of the entry or warrant any claim-jumper in wresting from another the fruits of years of toil. Until the court of last resort, in a proper case, does make such a decision I cannot do so."

The cross-complaint of Stewart in this action alleges that at the time of his homestead entry on Dec. 10, 1883, he was, and for many years prior thereto had been residing on the land which he owned adjoining said homestead, and since then has been and is the owner and in actual and peaceable possession thereof (Trans., pp. 4 and 5); and further alleges that it was proved before the Register and Receiver that after March, 1876, Stewart and his family, consisting of his wife and her children by a former marriage, continued to reside on said tract of land and that they resided thereon on the 10th day of December, 1883 (the day of the homestead entry).

These allegations of the cross-complaint are on demurrer conclusively presumed to be true, and we respectfully submit that the decision of the Secretary was not such as to estop Stewart from proving the truth.

The decision of the Secretary is very evidently based upon an erroneous construction of Sections 2289, 2290 and 2291 of the Revised Statutes.

The construction of these sections by the Land Department has been and is that by them it is required that the enterer of an adjoining farm homestead shall reside upon and cultivate the original farm for a period of five years. It is quite apparent that the Secretary did not confine his attention to the point at issue, to wit, the residence of Stewart *on the day he made his homestead entry.*

It seems quite clear that the requirements of the statute do not go beyond residence *at the time* the homestead entry is made.

Sec. 2289 provides as follows: "And every person owning and residing on land may under the provisions of this section *enter* other land lying contiguous to his land, which shall not, with the land so already owned and accepted, exceed in the aggregate 160 acres."

Sec. 2290 provides that upon filing the affidavit required in that section, the applicant "shall thereupon be permitted *to enter* the amount of land specified."

Sec. 2291 provides: "No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of *such entry;* and if at the expiration of such time, or at any time within two years thereafter, the person making *such entry* * * * proves by two credible witnesses that he, she or they have resided upon OR cultivated THE SAME for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, * * * then in such case he, she or they, *if at that time citizens of the United States,* shall be entitled to a patent, as in other cases provided by law."

This statute appears to be so plain as to be incapable of misconstruction.

With regard to an adjoining farm homestead, the only residence spoken of or required is that at *the time* of making the entry of the adjoining land.

The requirements of the California homestead law as to residence are precisely the same as those of Sec. 2289, U. S. It requires residence *at the time of making declaration of homestead.*

In a case before the Supreme Court of California the facts were that the homesteader resided with his family on the premises in October, 1879; on Dec. 6th he with his family moved away from the lands and soon after he rented the premises to a tenant; on June 24th, 1881, he made an arrangement with his tenant by which he gave up part of the rent and was permitted to occupy the front room of the house, and on the night of that day he took to the room some bedding and slept there. On the next day he executed and recorded a declaration of homestead. In a contest with a creditor the question was whether when he made his declation he was residing on the premises within the meaning of the law. The Court said:

"A homestead consists of the dwelling-house *in which the claim-*
"*ant resides,* and the land on which the same is situated, selected as
"provided in the Civil Code. (Civil Code, Sec. 1237.)

"The declaration of homestead must contain, among other things,

" a statement that the person making it *is residing on the premises,*
" and claims them as a homestead. (Civil Code, Sec. 1263.)

" To constitute a valid homestead, the claimant must *actually reside*
" *on the premises when his declaration is filed.* (Aucker *v.* McCoy, 56
" Cal., 524.)

" Was the plaintiff actually residing on the premises in question
" when his declaration was filed? After carefully considering the
" findings we are unable to say that he was not.

" Conceding, as claimed for the appellants, that he went back to
" the house for the purpose of qualifying himself to file a new decla-
" ration, still it does not follow that his residence was not actual.
" He had taken up his abode in the house, and had slept there one
" night. His wife and child did not go with him, but it was not
" absolutely necessary that they should. One may have an actual
" residence in a house, though his family be away and he take his
" meals elsewhere. Nor is the fact that he had slept there but one
" night decisive of the question. *After making an actual residence*
" *upon property, one may file a homestead upon it at the end of a day,*
" *as well as at the end of a month or a year.* So one may file and
" maintain a homestead upon property which is partially rented out
" or used for other purposes than his residence."

Skinner *v.* Hall, 69 Cal., 195–198.

This decision is the more marked because it is well settled in California that residence on the premises *subsequent* to the declaration of homestead is not required.

Porter *v.* Chapman, 65 Cal., 367.

Tipton *v.* Martin, 71 Cal., 325.

With respect to this question the language of the statute of the U. S. and of that of California are so nearly identical that a correct construction of the California statute must also be a correct construction of 2289, R. S. With respect to *continuance* of residence the two statutes differ in terms. We submit, however, that under the Revised Statutes a continued residence on the original farm is not required of the enterer of an adjoining farm homestead. This is apparent from the fact that by Sec. 2291, in order to get patent the enterer must prove residence *or* cultivation on *such* lands, to wit, the lands entered; the statute does not require residence *and* cultivation any where; the enterer has his option to reside on *or* cultivate the entered lands.

"The rule established in such cases is that when Congress en-
" acts a plain provision without limitation, no limitation can be
" imposed by the Court."

Pourier *v.* Barnes, 57 Fed. Rep., 958.

It may be claimed that such limitation is imposed by Section 2297, which is as follows:

" If at any time after the filing of the affidavit as required in Sec-
" tion 2290, and before the expiration of the five years mentioned
" in Section 2291, it is proved after due notice to the settler, to the
" satisfaction of the Register of the Land Office, that the person
" having filed such affidavit has actually changed his residence or
" abandoned the land for more than six month at a time, then and

"in that event the land so entered shall revert to the Govern-
"ment."

In this case that section could have no application because it does not appear that either of the matters mentioned therein was proved to the satisfaction of the Register of the Land Office, and also because in this case it was impossible that they could have existed. Stewart's entry was made Dec. 10, 1883, while this contest was heard before the Register and Receiver May 9, 1884, less than five months thereafter (Trans., p. 17, decision of Secretary Noble). As to affect a forfeiture a change of residence or abandonment must continue for six months, that section could not apply to this case. The ruling of the Land Office is that change of residence must continue for six months (See general circular of Jan. 1, 1889, prepared by Commissioner Stockslager, and approved by Secretary Vilas, 1 Copp's Pub. Land Laws, edition of 1890, p. 339; James *v.* Hall, 1 Copp, (1890) 442).

We also submit that so far as adjoining farm homesteads is concerned, that section does not affect our construction of the previous sections.

The provision against change of residence manifestly has no application to adjoining farm homesteads, because to take up such a homestead a residence is required *not on the land entered* but upon contiguous land, while to perfect title under such an entry and obtain patent a residence *on the land entered, i. e., a change of residence*, is expressly provided for. The dual character of this law, some portions of it applying only to original homesteads, and others only to adjoining farm homesteads, was recognized and commented upon by Assistant Attorney General Smith.

14 Opinions Att'y Genl.; Copp's Land Laws, p. 233.

The decision is as follows:

"DEPARTMENT OF JUSTICE, OFFICE OF THE ASS'T ATT'Y GEN'L.

"WASHINGTON, Oct. 18, 1871.

"*Sir:* I have considered the case of the alleged abandonment "by Abraham Rider of his homestead entry of the E. 1-2 of S. W. "1-4, Sec. 6, Tp. 96 N., R. 32 W., Ft. Dodge, Iowa.

"The local officers held that the charge of abandonment was sus-"tained, and their decision was affirmed by the Commissioner.

"Rider has appealed to the Secretary. It appears from the evi-"dence and is admitted by Rider, that he never resided upon the "land prior to the day of trial. He has cultivated a portion of it "for two years, but during that time he resided with his son, on "an adjoining 1-4 section owned by the son.

"The case presents the single question whether residence upon "the land is an essential element in a homestead claim, or whether "cultivation without residence is sufficient.

"I am of the opinion that residence is essential. The Home-"stead Act is entitled 'An Act to secure homesteads to actual "'settlers on the public domain.' The second section provides "that the applicant shall make affidavit, among other things, that "his 'entry is made for the purpose of actual settlement and culti-"vation.'

"The fifth section provides that the land shall revert to the "government upon its being proven that the claimant shall have "actually changed his or her residence, or abandoned the said "land, for more than six months at a time. The residence here "spoken of is residence upon the homestead tract. These express "provisions are not, in my opinion, to be overcome by the clause "in the second section which requires the claimant to prove by two "credible witnesses, that he has 'resided upon, *or* cultivated the "'same for the term of five years." *The word "or" in that section "was intended to apply to the case provided for in the proviso, to the "first section where the right is given to one who owns and resides on "an adjoining tract to enter under the Homestead Act other land lying "contiguous*, not exceeding in the aggregate one hundred and sixty "acres. *In such a case, residence on the land sought to be entered as "a homestead is not essential.* In all others it is.

"I am of the opinion that the Commissioner's decision in cancel- "ling Rider's entry was correct and recommend that it be affirmed.

"Very respectfully,

"W. H. SMITH, Ass't Att'y General."

This case was afterwards quoted as authority by Commissioner Harrison in the case of Charles C. Waters, Vol. 3, L. D., page 140, and is in fact the basis of all rulings of the Land Department requiring five years residence on an original homestead.

The subsequent legislation of Congress is in entire harmony with our construction of the laws relating to adjoining farm homesteads, and is not at all in harmony with that of the Secretary of the Interior.

Thus Sec. 3 of the Act of May 14, 1880 (21 Stats. at Large, p. 140) provides as follows:

"That any settler who has settled or who shall hereafter settle "on any of the public lands of the United States, whether surveyed "or unsurveyed, with the intention of claiming the same under the "homestead laws, shall be allowed the same time to file his home- "stead application and perfect his original entry in the United "States Land Office, as is now allowed to settlers under the pre- "emption laws to put their claims on record, *and his right shall "relate back to the date of settlement*, the same as if he settled under "the pre-emption laws."

Thus giving the homestead claimant who has been on the land five years prior to filing the township plat, the right immediately to a patent, without further residence or cultivation. It was held by Secretary Vilas that this act is applicable to an adjoining farm entry, and that one who had occupied such land for over five years, during which he was precluded from entering it by reason of the fact that it was claimed to be railroad lands, owning and occupying in the meantime a contiguous tract, was entitled to an immediate patent.

7 L. D., 33.

Carrying out the same principle Sec. 5 of "An act to withdraw certain public lands from private entry and for other purposes" (25 Stats. at Large, 854) provides:

" That any homestead settler who has heretofore entered less than " one-quarter section of land may enter other and additional land " lying contiguous to the original entry, which shall not, with the " land first entered and occupied, exceed on the aggregate one hun- " dred and sixty acres, without proof of residence upon and culti- " vation of the additional entry; *and if final proof of settlement and* " *cultivation has been made for the original entry when the additional* " *entry is made, then the patent shall issue without further proof.* PRO- " VIDED, that this section shall not apply to one for the benefit of " any person who at the date of making application for entry here- " under does not own and occupy the lands covered by his original " entry. *And provided*, that if the original entry should fail for any " reason prior to the patent or should appear to be illegal or fraud- " ulent, the additional entry shall not be permitted, or if having " been initiated shall be cancelled."

This section is in fact and intent a supplement to Sec. 2289, and extends the privileges conferred by that section to persons who have only an inchoate title to lands which they occupy, by reason of a homestead thereon. It is significant that Congress speaks of the person who has such inchoate title as an *owner* of the land in the first proviso above cited. Any other construction of that proviso would nullify the preceding portion of the section. When such person had perfected his title to his original homestead, he had a right immediately to a patent for the adjoining farm without further residence or cultivation.

We submit therefore that the decision of the Secretary was in no way conclusive, and that the demurrer to our cross-complaint should have been overruled.

## IV.

### CONCLUSIVENESS OF SECRETARY'S DECISION.

*First, Second and Fourth Specifications of Errors.*

If the Court holds with us that the decision of the Secretary was beyond the scope of his jurisdiction, that ends this case in our favor.

If it holds otherwise, then we submit that the Secretary's decision cannot estop us from proving the truth, unless a decision by him in our favor would have precluded the government from further inquiry into the matters decided. But the Land Department holds that the decision of its officers in a contest between individuals is of no effect whatever when the successful individual applies for a patent. That the government is still at full liberty to inquire into the matter and reverse the prior decision of its officers.

*In re* Henry J. Redmond, 1 Copp's Land Laws (1890), 251.

The decision was by Acting Secretary Muldrow, in 1886, and so far as we are advised has never been overruled or questioned by subsequent Secretaries.

In this case we have no relation whatever with McHarry. He claims under the United States by patent. We claim that under the United States we had the right to the patent. Our claim is based solely on our relations with the government. If the decision of the Secretary of the Interior, if it had been in our favor, would have

been of no avail to us, then his decision against us can in no way prejudice us.

## V.

### Conclusiveness of Secretary's Opinion as to Duress as Excuse for Non-Residence.

*First and Fourth Specifications of Error.*

In the cross-complaint it is alleged as follows (Trans., p. 6):

Cross-complainant further alleges that at the hearing of said contest before said Register and Receiver, the fact was proven that the plaintiff and members of his family threatened the life of this cross-complainant and attacked him at various times since he took possession of said lands, shot at him at the house in which he and his family resided, and thus put this cross-complainant in reasonable fear of his life and of personal violence of himself and family, and thereby compelled him to remove to the town of Martinez, and that thereafter this cross-complainant employed tenants who held actual possession of said land for him and that said tenants were assaulted by said plaintiff in a similar manner, and that upon two occasions said plaintiff and members of his family were arrested for such assaults. That said Register and Receiver refused to find facts from such testimony, but decided that it was unnecessary to consider the same.

And again it is alleged (Trans., p. 9):

Tenth. That thereafter [meaning after October 2, 1882], said cross-complainant and his family, consisting of his wife and her children by a former marriage, continued to reside upon said tract of land so conveyed to him by said Getta Stewart, and that they were residing thereon on the 10th day of December, 1883.

* * * * * * * * *

Twelfth. That the said cross complainant thereafter continued to cultivate the land included in his said homestead entry in connection with said adjoining land conveyed to him by his said wife, either by himself or tenants, to the day of said hearing in said Land Office.

Thirteenth. That during the time said land was cultivated by said cross-complainant through tenants, the house forming his residence upon the tract conveyed to him by his said wife, was specially reserved to himself and family and was occupied by him and his family at short intervals, and that said cross-complainant furnished the seed to sow said land and receive a share of the crops produced upon said land as his rent from said tenants during said time.

Fourteenth. That the land included in this cross-complainant's homestead entry was enclosed in a good and substantial fence, together with the land conveyed to him by his said wife.

Fifteenth. That the plaintiff in this action and members of his family ever since the marriage of the cross-complainant to his said wife showed enmity and ill-will towards said cross-complainant and his family, and on several occasions threatened the life of this cross-complainant and assaulted him at various times and shot at him and at the house in which he and his family resided upon the land conveyed to him by the said Getta Stewart.

Sixteenth. That said assaults were committed by said plaintiff and members of his family for the purpose of driving said cross-complainant from said premises.

Seventeenth. That said assaults and acts of violence by said plaintiff inspired said cross-complainant with reasonable fear of his life and fear of great bodily harm to his family and induced him to remove with his family temporarily to Martinez.

Eighteenth. That after such removal such cross-complainant maintained possession of said premises by tenants who cultivated the land for him for a share of the crops raised thereon, and that the said plaintiff in this action and members of his family acting for him committed similar acts of violence towards said tenants, and upon two occasions some of them were arrested therefor upon complaint of said tenants.

These allegations, on the demurrer to the cross-complaint, must be taken as true.

The Register and Receiver in fact made no finding whatever as to the question of threats and duress, but the Commissioner of the General Land Office found as follows (Trans., p. 16):

"Stewart thereupon assumed control of said land, and although McHarry and his relatives and confederates have threatened the life of Stewart, and attacked him at various times, shooting at him and the house in which he and his family lived, finally forcing him to abandon his property and remove to the town of Martinez, some miles distant; it is shown that he has maintained constructive possession of the land in controversy up to the date of hearing. Stewart's tenants were similarly dealt with by the McHarrys, but resisted the attempts made to dispossess them by force and succeeded in retaining possession of the land.

The testimony shows that the McHarrys attempted to take forcible possession of the land in controversy, and the facts indicate a determination to do so at whatever cost.

It is safe to conclude that Stewart was in danger of his life, and the attempt of McHarry to show that Stewart had removed to and was living in the Town of Martinez at the time he made his entry, would prove impotent to defeat Stewart's right to enter if McHarry had succeeded in establishing that fact."

The Secretary of the Interior in his decision does not controvert the *facts* alleged in the cross-complaint, and found by the Commissioner of the General Land Office to be sustained by the evidence, but on that branch of the case says (Trans., p. 22):

"The excuse set up by Stewart for such non-residence, namely, "that it was because of danger of violence and injury at the hands "of the McHarrys is not sustained by the evidence. *Mrs. Stewart "herself testifies that she went to the farm and remained there for short "periods, whenever she felt inclined, and seems never to have been mo-"lested, and no attempt to prevent Stewart or his family from residing "on the original farm at any time is shown.*"

By the pleadings in this case it is an admitted fact that the testimony before the Secretary of the Interior showed that McHarry and members of his family threatened the life of Stewart and attacked him at various times after he took possession of the land in dispute;

*shot at him* at the house in which Stewart and his family resided, to wit, the house on the original farm, and put Stewart in reasonable fear of his life and of personal violence to himself and family, and thereby compelled him to return to Martinez, and that thereafter McHarry assaulted Stewart's tenants in a similar manner, and that on two occasions McHarry and members of his family were arrested for such assaults; that these assaults were committed for the purpose of driving Stewart from the premises; and in addition to the admission in the pleadings in this case the Commissioner of the General Land Office finds that these facts were in fact proven.

In view of these admitted facts the decision of the Secretary of the Interior, which does not at all reverse the findings of fact of the Commissioner on those points, must be held to mean that in the opinion of the Secretary these facts together with the other fact found by him, that after leaving the farm Mrs Stewart sometimes revisited it and was not shot at by McHarry [perhaps for the reason that he did not know she was there] are not sufficient *facts* to excuse the lack of *actual* residence on his original farm by Stewart. As the facts which appeared in evidence are admitted and uncontested, it would be an injustice to the Secretary to construe his decision otherwise than as an admission and avoidance of these conceded facts.

It is the settled ruling of the Land Department that threats and reasonable fear of bodily harm are sufficient excuse for want of actual residence under the land laws.

Andrews *v.* Forrest, 1 Copp Land Laws, (1890), 444.

Dorgan *v.* Pitt, 1 Copp Land Laws (1890), 484.

The facts being admitted, as in this case they are, the question whether they amount to a sufficient excuse is purely a question of law, in the solution of which the Secretary of the Interior undoubtedly erred, and we have the right in this case to have the decision of a court upon the matter.

While the cross-complaint is not as definite as might be desirable upon that point, it would seem to appear therefrom that the removal to Martinez was subsequent to the homestead entry of Stewart on Dec. 10th, 1883, or perhaps that after the first removal, he returned to his original residence prior to Dec. 10th, 1883, was present in person and with his family there on that date, and was again driven away by McHarry, but the legal residence and domicile of Stewart is claimed to have been at all times at the original farm, though for the reasons stated he and his family were a great portion of the time absent therefrom.

## VI.

### Stewart's Title to Original Farm.

The burden of the Secretary's decision is that Stewart was not, within the meaning of Sec. 2289, R. S., the owner of lands contiguous to the lands entered by him as an adjoining farm homestead. As the Supreme Court of California overruled the decision of the Secretary on that point, we think we might safely rely on that decision, but out of abundant caution, we will supplement it by further argument in anticipation of the argument on the other side. As we

are quite satisfied with the decision of the Supreme Court of California on that point, this argument of course does not come under any specification of error.

The facts as to Stewart's title are correctly stated by the Secretary as follows:

"The land claimed by Stewart as a basis for his entry is the S. E. ¼ of S. W. ¼ and a fraction in the S. W. ¼ of the S. E. ¼ of Sec. 22 in said T. 2 N., R. 3 W., (about sixty acres in quantity), and is portion of a tract of one hundred and seventy-five (175) acres, which, as a part of the estate of James McClellan, deceased, had been, February 19, 1876, duly set apart by decree of the Probate Court of Contra Costa county, California, (in which it was situated) as a "Probate Homestead" under the laws of California, for "the use of" the family of said deceased. The family consisted of the widow and two minor children, a girl and boy, aged respectively at date of said decree (February 19, 1876), four and five years. The widow subsequently married Stewart, and he claims the ownership of said sixty acres, under a deed from her therefor, executed October 2, 1882."

We shall not repeat any portion of the statement of the Supreme Court as to the rights of Stewart under the laws of California, but refer to them as a complete answer to the argument of the Secretary. (Trans., p. 36.)

The Secretary seems to hold that the ownership contemplated by Sec. 2289 is an estate in fee simple absolute to the entire tract of contiguous land, and that neither an equitable title or a title as tenant in common or joint tenant would satisfy the statute. We submit that the Secretary was in error in his construction.

The homestead laws are to be liberally construed. The words "owner" and "owning" are very general terms and embrace almost all shades of proprietary rights. To "own" is to hold as property; to have a legal or rightful title to; to have; to possess.

17 Am. and Eng. Enc. of Law, p. 298.

"Owner of real property" includes any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee or an estate less than a fee.

17 Am. and Eng. Enc. of Law, p. 299.

The word "owner" has no technical meaning, and being *nomen generalissimum* should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the legislature to protect.

Harris Am. Const. Law, 355, citing:
Railroad Co. *v.* Boyer, 13 Pa. St., 497-499.
Watson *v.* N. Y. C. R. R. Co., 47 N. Y., 161.
Moeller *v.* Harvey, 16 Phila. (Pa.), 66.
Schott *v.* Harvey, 105 Pa. St., 222.

The word "owner" under homestead statutes has been construed liberally and never limited to owner in fee.

Burns *v.* Keas, 21 Iowa, 263.

The word "owner" has no precise legal signification and may be applied to any defined interest in or to real estate.

Gitchell *v.* Kreidler, 84 Mo., 476.

As used in homestead statutes it includes an equitable as well as a legal ownership

Wilder *v.* Haughey, 21 Minn., 101.

Hartman *v.* Munch, 21 Minn., 107.

Also a partnership, *i. e.*, an undivided interest.

Ferguson *v.* Smith (Mont.), 34 Pac. Rep., 1020.

Under law prescribing qualifications of jurors one is an owner of real estate of which he is in possession or in which he has a qualified interest.

Territory *v.* Young, 2 New Mex., 93.

Under policy of insurance requiring the owner to have the "entire unconditional and sole ownership" it was held in the Circuit Court for the Southern District of N. Y., that where the insured produced a deed purporting to convey the premises, the title of the grantor could not be inquired into. The Court says: "In the "ordinary acceptance of the term who would be considered the "owner of real estate except the grantee in possession, where no "adverse claim has been made by another?"

Miller *v.* Alliance Ins. Co., 19 Blatch., 308; 7 Fed., 649.

In this case we were in possession under a deed purporting to convey the entire title. (Trans., p. 12.)

Is it fitting that the government should try to evade its contract with us by attempting to pick a flaw in our title?

An equitable title will sustain the allegation of ownership.

Guest *v.* N. H. F. Ins. Co., 66 Mich., 98.

Am. Basket Co. *v.* Farmerville Ins. Co., 3 Hughes, 251.

Pelton *v.* Westchester F. Ins. Co., 77 N. Y., 605.

Franklin F. Ins. Co. *v.* Crockett, 7 Lea (Tenn.), 725.

Lebanon Trust Ins. Co. *v.* Erb, 112. Pa. St., 149.

Johannes *v.* Standard Fire Office, 70 Wis., 196.

Warner *v.* Milford M. F. Ins. Co., 153 Mass., 335.

And the holder of an equitable title to an undivided interest is the "owner."

Williams *v.* Buffalo German Ins. Co., 17 Fed., 63.

In application for insurance, the insured had stated that he was the "owner" of a vessel. In fact, he owned sixty out of sixty-four shares. Held: that his statement was true in letter and in spirit and that he was entitled to recover.

Lyon *v.* Stadacona Ins. Co., 44 Up. Canada, Q. B., 472.

A Kentucky decision is in precisely the same lines as the decision of the Supreme Court of California in this case on this point.

The insured represented that he was the owner in fee of the ground on which the insured building stood. He in fact owned only one-fourth interest in fee, but had substantially erected the building thereon at his own expense. The Court held that in partition the building and the land on which it stood would be set apart to him and says "no court, it seems to us, should hold that the fee is not in the appellee for the reason that partition has not been made."

Kenton Ins. Co. *v.* Wigginton, 89 Ky., 333-338.

The Secretary of the Interior in assuming that the ownership required by Sec. 2289 was the sole, unconditional, absolute estate in fee is not at all supported by adjudicated cases. He refers to the

codes of California in support of his decision, but the definitions therein given, and which are copied from the report of the Code Commissioners of New York, submitted to the legislature of that State in 1865, are entirely in favor of the construction we put upon Sec. 2289, R. S.

The sections of the California Code are Civil Code, Secs. 678 to 682 inclusive, and of the proposed N. Y. Civil Code, Secs. 171 to 175 inclusive. These sections read as follows:

The ownership of property is either: Absolute; or, qualified.

The ownership of property is absolute when a single person has the absolute dominion over it, and may use or dispose of it, according to his pleasure, subject only to general laws.

The ownership of property is qualified: When it is shared with one or more persons; when the time of enjoyment is deferred or limited; when the use is restricted.

The ownership of property by a single person is designated as a sole or several ownership.

The ownership of property by several persons is either: Of joint interests; of partnership interests; of interests in common.

To the last definition the California Code adds: "Of community interest of husband and wife," which is not in the proposed N. Y. Code.

These definitions are not experiments; they are simply an expression in a short form of the results of the best judicial opinion.

As Sec. 2289, R. S., does not require that a man shall be a sole owner, or an unconditional owner of contiguous property in order to qualify him to enter an adjoining farm homestead, but merely that he shall *own* the same, these definitions referred to by the Secretary amply sustain our contention that it is a full compliance with the law, if he is an equitable owner or an owner of an undivided interest.

It is significant that in the only other instance in which the term "own" or "owner" is used in the homestead laws, it is used to designate not an owner in fee, but the inchoate title arising from a homestead entry, which is subject to be defeated by subsequent non-compliance with the homestead laws. In section five of the Act of Congress of March 2nd, 1889 (25 Stats. at Large, p. 854), which section gives the right to the enterer of a homestead of less than 160 acres to enter an additional homestead on contiguous lands it is "*Provided*, That this section shall not apply to or for the benefit "of any person who at the date of making application for entry "hereunder, does not *own* and occupy the lands covered by his "original entry." It is apparent from the context that a person is the *owner* of the land covered by his original entry, within the meaning of this statute, the minute he makes his original entry, and such is the construction given in the statute by the Land Department.

*In re* John R. Casern, 16 C. L. O., 160, by Ass't Secretary Chandler.

For many years our present construction of Sec. 2289 was the rule of action of the Land Department.

In February, 1876, acting Commissioner Lippincott held that the

owner of an undivided interest could enter an adjoining farm homestead.

*In re* Douglas Dummett, 2 C. L. O., 181.

Commissioner McFarland ruled the same way in June, 1882.

*In re* Thos. S. Wetherbee, 9 C. L. O., 148; 1 L. D., 38.

And since the decision of the Secretary in this case Ass't Sec'y Chandler in February, 1890, held that the owner of an equitable title could make such entry.

Carnes *v.* Smith, 16 C. L. O., 170.

We submit that these decisions are more in accordance with the spirit of the homestead laws and with the proper construction of Section 2289, R. S., than is the decision of the Secretary, and that the decision of the latter should not be allowed to stand as a correct exposition of the law. It was to a very great extent founded on a misconception of the laws of California, as already appears from the decision of the Supreme Court of that State in this case.

The Hon. Secretary in his decision supposes a case where twelve persons might own 120 acres as tenants in common, and all reside in one house and each enter of adjoining public land enough to make 160 acres for each, &c. In reply it is enough to say that such a case has not yet happened and that it is extremely improbable that it ever will happen, but if it ever does, there would be twelve duly qualified citizens provided with homesteads, who would have to cultivate their lands for the statutory period before receiving their patents, and there would not be the slightest harm done by their exercise of the right given them by law.

If the Hon. Secretary's ruling is sound, then if a husband and wife in California reside upon forty acres of land, which has been acquired by them since their marriage and upon which a declaration of homestead under the State law is filed by the wife, the husband could not make an adjoining homestead entry because, as held in Burkett *v.* Burkett, 78 Cal., 310, the effect of declaring a homestead is to convert a separate title into a joint title. We can see nothing in the law which requires that an adjoining farm homestead claimant must own the *whole title* of the tract constituting the original farm. It seems to us immaterial if he owns all, or half of it or less, divided or undivided, in either case he is certainly an owner, and as long as his ownership gives him the right to reside upon it, *and as long as it is extensive enough for that purpose and if he have a residence upon it*, it seems to us he is entitled, by such ownership, to make an adjoining farm homestead entry upon adjoining public land.

## In Conclusion.

We respectfully submit that for each and all of the reasons which we have presented, our cross-complaint was one which showed us entitled to relief in equity.

It is manifest from the decision of the Supreme Court of California in this case, that that Court fully appreciated the wrong we suffer by an adverse decision, and that it was the feeling that the

construction of United States Statutes, and review of the decisions of the Land Department, was more properly the province of United States Courts, that largely influenced the decision that was made.

Respectfully submitted,

E. W. McGRAW,
THEO. WAGNER,
*Counsel for Plaintiff in Error.*

Office Supreme Court, U. S.
FILED
OCT 21 1895
JAMES H.

# BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

No. 366

# In the Supreme Court of the United States.

JAMES STEWART,
*Plaintiff in Error,*

*Vs.*

DANIEL S. C. McHARRY,
*Defendant in Error.*

CHARLES E. WILSON,
W. S. WELLS,
*Counsel for Defendant in Error.*

Filed _____ 1895.

# In the Supreme Court of the United States.

JAMES STEWART,

*Plaintiff in Error,*

*Vs.*

DANIEL S. C. McHARRY,

*Defendant in Error.*

## BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

### Statement of the Case.

We desire to add to the statement of the case made by counsel for plaintiff in error, in their printed brief and argument, an extract from printed brief and argument by counsel for defendant (plaintiff in error here), filed in the Supreme Court of the State of California in this cause, as follows, viz:

"On October 19, 1889, a motion for a re-hearing of the decision of the "Secretary of the Interior was filed on behalf of Stewart, in the United "States Land Office at San Francisco, which motion was forwarded to "the Secretary of the Interior on December 3, 1889, and was denied by "the said Secretary by letter filed on June 17, 1890, and on the 14th "day of July, 1890, McHarry, the respondent, was permitted by the "Land Officers to make his pre-emption entry, including the land in dis-"pute, upon which a patent was issued, dated February 26, 1891.

"Theodore Wagner, one of the attorneys for the appellant here, was "appellant's attorney before the Department of the Interior, and made "the motion for rehearing for appellant, but was never informed of any "action taken thereon until after the patent had been issued to the respon-"dent, and said attorney was not aware of any action upon said motion "until after the cross-complaint was filed for appellant, and for that "reason no copy of the decision of the Secretary of the Interior upon the "motion for a rehearing was included in the cross-complaint. To bring "the whole matter before this Court, we herewith print a copy of the "Secretary's decision on the motion for a rehearing, as a part of our

"brief. This copy was kindly furnished by the attorney for the respond-
"ent in the argument on Demurrer in the court below, and is as
"follows:

"COPY. DEPARTMENT OF THE INTERIOR. V. B.

GENERAL LAND OFFICE,

WASHINGTON, D. C.,

"706–90. May 19, 1890.

"McHARRY } MOTION FOR REVIEW.
*vs.*
"STEWART. } ADJOINING FARM ENTRY.

"*The Commissioner of the General Land Office:*

"SIR:—On December 10, 1883, James Stewart made homestead "entry (adjoining farm) No. 5734, for lots 2 and 3, Sec. 22, and lot 1, "Sec. 27, T. 2 N., R. 3 W., Mount Diablo Meridian, San Francisco "land district, California. On December 13, 1883, Daniel S. C. "McHarry filed declaratory statement No. 17,834, for the same tracts, and "certain others not in dispute, claiming settlement thereon January 18, 1878. "The plat of survey of said township was filed December 10, 1883. Subse-"quently HcHarry gave notice of his intention to make proof in support of "his pre-emption claim. Against this proof Stewart protested as to the "described lands, and a hearing was had May 9, 1884, at which both "parties were represented and testimony submitted. The judgment of "the local officers was adverse to Stewart, who appealed. On Septem-"ber 1, 1886, your office reversed said judgment, and McHarry appealed. "On September 16, 1889, the judgment of your office was reversed, "and that of the local officers affirmed. (See 9 L. D. 344).

"The case is again before me on a motion on behalf of Stewart to "review and reverse the department decision.

"The facts of the case are fully and fairly stated, and the law applicable "thereto discussed at length, in the reported decision, so that it is suffi-"cient for the purposes of considering this motion, to briefly restate the "principal facts.

"One James McClellan was the owner, before his marriage, of one "hundred and seventy-five acres of land purchased from the owners of "the Pinole Rancho. He died in 1871, leaving a widow and two minor "children. On February 18, 1876, said tract of land was set apart by the "probate judge of Contra Costa County, as a homestead "for the use of the "family,' in accordance with the provisions of the laws of California. "(See Code and Statutes, Sections 6260 and 11,465). This homestead "adjoins the lands in controversy in this case. Shortly afterwards the "widow of McClellan married James Stewart, the contestant here, and on "October 2, 1882, she executed a deed purporting to convey to Stewart "the 'S. E. ¼ of the S. W. ¼ and fraction in the S. W. ¼ of the S. E. "¼' of Section 22, T. 2 N., R. 3 W., being about sixty acres of said "homestead which lies contiguous to the lots in question.

"It is the alleged ownership of and residence upon this tract of sixty "acres which is the basis of Stewart's claim to make an adjoining farm "entry under Section 2289, Revised Statutes.

"On this state of facts and the testimony submitted at the hearing, it "was held by the Department, substantially, that the deed from his wife

"to Stewart did not convey to him such an estate in the land embraced "therein as will sustain an adjoining farm entry, and that, independently "of the defect in the title, the evidence showed that Stewart did not "reside upon the land he claimed to own during the period covered by "his adjoining farm entry.

"It is urged that said decision should be reviewed and reversed because "(1) the laws of California relating to probate homesteads are miscon- "strued therein; (2) because the ruling that an undivided interest in land "does not afford a legal basis for an adjoining farm entry is erroneous, "harsh and new; (3) being new, the point should be fully argued; (4) "said decision is based on facts not passed on by the local officers, and "is contrary to the finding of the Commissioner of the General Land "Office on the same facts; and (5) if said decision is right in regard to "probate homesteads, then the case ought to be sent back in order that "the minor children of McClellan should be represented in the case. In "conclusion, sufficient time is asked for filing a brief in support of the "points presented, of which the substance only is given.

"Though the motion for review was filed on October 19, 1889, no "argument has been presented in relation thereto up to the present "time.

"In disposing of this motion it is not necessary to answer the specifica- "tions of errors as given above.

"A number of witnesses were examined at the hearing and a large "amount of testimony was taken at the time, much of which is conflict- "ing, unsatisfactory and evasive. It has all been gone over patiently, "and from that submitted in behalf of Stewart, including the testimony "of himself and wife, it is quite clear that he had not resided upon the "land, which he claims to own, since 1879, when he removed therefrom "to the town of Martinez, some miles away, where he has, with his family, "lived, and where he has carried on a grocery store and keeps a saloon. "The claim, on his part, of residence upon the homestead is a mere pre- "tense, and is only evidenced by occasional excursions or visits by him- "self and wife to said land, which has been all the time in the occupation "of and cultivation by a tenant. The town residence has never been for "a moment abandoned, and is not claimed to have been abandoned at "any time. But whilst retaining and occupying it, carrying on business "in connection therewith for years, the bold claim is made that his resi- "dence has been and is upon the homestead tract. This claim has only "assertion to support it, while all the facts contradict it.

"The excuse set up by Stewart that he was deterred from maintaining "an actual residence upon the probate homestead because of threats and "fear of violence on the part of the McHarrys, is not supported by the "evidence, is in conflict with his claim of and attempt to show actual "residence thereon, and is contradicted by his own testimony and that of "his wife, wherein it is asserted that they were in the habit of going upon "the land and staying as long as they pleased or found it convenient.

"I therefore hold that the claim of residence, as well as the inconsistent "excuse for failure to maintain the same, are without foundation in law or "fact.

"Having come to this conclusion, it is not necessary to pass upon the "other questions in the case, for, as Section 2289 of the Revised Statutes "only allows an adjoining entry to a person 'owning and residing on'

"contiguous land, even if all the other questions were decided favorably "to Stewart, this want of residence would be fatal to his right to enter "the lots in question as an adjoining entry.

"Entertaining these views, the motion is denied, and the papers are "herewith returned to you.

Very respectfully,
JOHN W. NOBLE,
*Secretary.*"

Acting upon the suggestion of counsel for defendant, to which plaintiff did not object, this decision of the Secretary of the Interior on motion for review of his former decision, was considered by the State Supreme Court (see Opinion, Trans. p. 44), and it seems to us but fair to that Court that it be considered here; furthermore, the decision upon the petition for review is the final decision of the Department of the Interior in the case, and its consideration is necessary to a proper determination of the questions involved.

## ARGUMENT.

As a matter of convenience we will traverse the argument of counsel for plaintiff in error, in the order followed in their brief.

### I.

### JURISDICTION OF THE SECRETARY OF THE INTERIOR.

While we do not consider the question as to whether or not the land in controversy was properly awarded to McHarry by the officers of the Land Department material to this case, in view of the argument and citation of authorities by counsel for plaintiff we call attention to the fact that McHarry did not intrude forcibly or otherwise upon the *possession* of Stewart, but settled *outside of Stewart's inclosure;* so that the case of *Atherton* vs. *Fowler*, and other cases cited by plaintiff in error, are not in point. The Register and Receiver found as follows (Trans. page 14):

"The testimony shows that the land in contest had been in the posses- "sion of Mrs. Stewart and her husband, the contestant; that McHarry "settled upon the land *outside of the possession of Stewart*, and has made "sufficient residence, improvement and cultivation."

The Secretary of the Interior finds (Trans. page 22) as follows:

"The proof shows as found by the local officers that McHarry settled "and established residence upon a portion of the tract covered by his "filing, outside of that portion in contest between himself and Stewart, "claiming possession of the entire tract under his filing, and that he has "reasonably complied with the law as to residence, improvement and culti- "vation. The possession by Stewart of a part of the tract covered by "McHarry's filing being under his (Stewart's) *invalid* adjoining farm "entry, did not prevent McHarry's constructive possession and rights "under his filing extending over the entire tract."

In *Belk* vs. *Meagher*, 104 U. S. 287, referring to *Atherton* vs. *Fowler*, this Court said:

"In that case it was held a right of pre-emption could not be estab- "lished by a forcible intrusion upon the possession of one who had already "settled upon, improved and inclosed the property. Upon that prop-

" osition the Court was unanimous. We also all concur that if a peace-
" able entry had been made on the lands which had not been inclosed or
" improved, a good right might have been secured."

And in *Quinby* vs. *Conlan*, 104 U. S. 420, this Court affirms the doctrine of *Atherton* vs. *Fowler*, and further says:

" But settlement upon a portion of a quarter section, and making the
" improvements required by law, will sustain a pre-emption claim to the
" whole quarter section as against subsequent settlers."

So we claim that the Land Department did not err in awarding the land to McHarry and issuing patent therefor to him.

But this is a question which does not concern the plaintiff in error. It is admitted that patent has been issued to McHarry, and that he now holds the legal title to the land by virtue of said patent. The plaintiff in error, however, claims that the patent should have issued to him. The Secretary of the Interior finds upon the facts proven, as a matter of law, that Stewart was not entitled to the patent; not by reason of the prior claim of McHarry, but for the reason that Stewart neither owned nor resided upon the land claimed by him as an original farm. So Stewart cannot be heard to complain of the action of the Government in issuing the patent to McHarry. " It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the Government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

*Lee* vs. *Johnson*, 116 U. S. 48;
*Bohall* vs. *Dilla*, 114 U. S. 47;
*Sparks* vs. *Pierce*, 115 U. S. 408;
*Smelting Co.* vs. *Kemp*, 104 U. S. 636;
*Boggs* vs. *Merced M. Co.*, 14 Cal. 279;
*Shanklin* vs. *McNamara*, 87 Cal. 371.

If we understand the position taken by counsel for plaintiff in error, it is that all of the questions presented by the contest before the Register and Receiver upon which evidence was introduced should have been decided by them, and that the Commissioner and the Secretary of the Interior had no power to pass upon questions of fact not passed upon by the Register and Receiver; that it was the duty of the Commissioner when he reversed the decision of those officers upon the only question passed upon by them, to wit, ownership of the original farm, to send the case back with instructions to the Register and Receiver to pass upon all of the other questions.

Sec. 2273, R. S., is quoted as prescribing the duties of the Register and Receiver, and is claimed to be mandatory. We consider this section directory only, clothing the Register and Receiver with authority to inquire into and determine controversies relating to public lands, which otherwise would devolve upon the Secretary of the Interior, or one appointed by him by virtue of the Act investing him with supervision over the disposition of public lands. Provisions of this character are not usually considered mandatory unless accompanied by negative words importing that the acts required shall not be performed in any other manner or place than that designated. (Am. and Eng. Enc. of Law 23, p. 458.)

The appeal to the Commissioner or Secretary of the Interior given by Statute must carry with it the power to those officers to review the action of their subordinates. An appellate tribunal, unless restricted by the

power which created it, has unlimited jurisdiction to determine the questions properly before the inferior, and to aid them may consider all of the evidence and facts that were used to influence the tribunal having original urisdiction.

The question of the supervisory power of the Secretary of the Interior over all matters relating to sale and disposition of the public lands has been fully considered by this Court in *Lee* vs. *Johnson*, supra, *Bohall* vs. *Dilla*, supra, *Knight* vs. *United States Land Association*, 142 U. S. 161, and *McDaid* vs. *Oklahoma, ex rel Smith*, 150 U. S. 215. In the last named case referring to *Knight* vs. *U. S. L. A.*, this Court says:

"It was declared by Mr. Justice Lamar, speaking for the Court, that "the Secretary was clothed with plenary authority as the supervising "agent of the government to do justice to all claimants, and to preserve "the rights of the people of the United States, and that he could exercise "such supervision by direct orders or by review on appeal; and in the "absence of statutory direction prescribe the mode in which it could be "exercised, by such rules and regulations as he may adopt."

Counsel for plaintiff in error acknowledges the supervisory power of the Secretary, but claims that it is restricted "to cases where the entry is "fraudulent or illegal upon its face, *or is conclusively shown to be so in the "contest*, or to *ex parte* cases." This case is strictly within the rule recognized by counsel, because in order to make entry of the land Stewart was obliged to make affidavit, and did make affidavit that he was residing upon the original farm (Trans. p. 5), which statement the Secretary finds to be false and therefore fraudulent.

In our judgment all of the questions that are raised by plaintiff in error are involved and decided in the case of *Lee* vs. *Johnson*. In that case an attack was made upon the homestead entry upon the ground of abandonment, and none other. The case went to the Secretary of the Interior on appeal, and that officer came to the conclusion from the evidence returned by the Register that the entryman must be considered not as a *bona fide* homestead claimant acting in good faith, but as one seeking by a seeming compliance with the forms of law to obtain a tract of land for his son-in-law, who had previously exhausted his homestead privilege, observing that the element of good faith is the essential foundation of all valid claims under the homestead law. Upon an application for a rehearing the Secretary reiterated his judgment, stating that he was unable, upon the testimony of the entryman himself, to arrive at the conclusion that he had complied with the provisions of the homestead law to an extent to entitle him to its benefits.

The Supreme Court of the State of Michigan held the decision of the Secretary of the Interior inconclusive, because it was not upon a point at issue between the contestants, stating that the question was that of abandonment, which, only, was inquired into by the Register, or could be considered on appeal; that the jurisdiction of the Secretary, if he disposed of the case finally on other grounds, was not appellate but original. This Court overruled the decision of the Supreme Court of Michigan, and in defining the powers of the Secretary of the Interior, say:

"Under these circumstances, so far from having exceeded his jurisdic- "tion in directing a cancellation of the entry, he was exercising only that "just supervision which the law vests in him over all proceedings insti- "tuted to acquire portions of the public lands. Upon the testimony, the

"question of abandonment could be of no consequence, as no just right "in Johnson's favor had been initiated."

In the case at bar, the record shows that the questions of Stewart's residence upon and ownership of the original farm were directly in issue before the Register and Receiver, the Commissioner of the General Land Office, and the Secretary of the Interior; the two latter having found expressly upon those issues. Upon the facts proven all other questions involved became of no consequence, as the evidence showed that no just right in Stewart's favor had been initiated. By the express terms of the statute he was required to be a resident upon the original farm at the time he made his entry. This is admitted by counsel. It having been proven that he did not so reside, not only had the Secretary of the Interior jurisdiction to cancel the entry, but it was his duty so to do.

But we insist further that the plaintiff in error cannot be heard to raise these objections for the first time in the courts, as he attempted to do. He appeared before the Register and Receiver and submitted evidence in support of his claim. The Register and Receiver decided against him upon the ground that he did not own the land claimed as an original farm. From this decision he appealed to the Commissioner of the General Land Office.

The cross-complaint does not disclose the grounds of this appeal, but in view of the importance which counsel now attach to the neglect of the Register and Receiver to consider the question of residence by Stewart, it is fair to presume that it was alleged as error and made a ground of appeal. That the Commissioner considered this question appears from his decision. (Trans. page 15). He excuses Stewart's non-residence on the ground of intimidation by the McHarrys. Stewart did not appeal from this decision—he was satisfied with it. It nowhere appears in the record that any objection to the jurisdiction of any of the officers of the Land Department was made by Stewart, nor that any claim was ever made or urged in his behalf, that the case should be sent back to the Register and Receiver for *finding upon the question of residence* until the cross-complaint was filed in the State Court. It does appear from the Secretary's decision on motion for review, (p. —— hereof), that the following points were urged: * * * *

"* * 4. Said decision is based upon facts not passed upon by the "local officers, and is contrary to the finding of the Commissioner of the "General Land Office on the same facts. 5. If said decision is right in "regard to Probate Homesteads, then the case ought to be sent back *in "order that the minor children of McClellan may be represented in the "case.*"

At no time in the proceedings before the Land Department, so far as the record shows, was it claimed that the case should be sent back to the Register and Receiver for finding upon the question of Stewart's residence. But if as a matter of fact the point was made on the appeal of Stewart to the Commissioner from the decision of the Register and Receiver, it was inferentially, at least, overruled, and failing to appeal from that decision or to apply for a review thereof in accordance with Rules of Practice 76 to 80, the point was waived.

## II.

### Jurisdiction of the Register and Receiver.

In this regard counsel for plaintiff in error claim:

1. That there is no statute which empowers the Register and Receiver to annul a homestead entry. We may dispose of this claim by saying that no such contention is made. But as counsel say (page 11, Brief), they may refuse to allow an entry to be made, for good reasons, and the Secretary of the Interior for like good reasons, appearing on the face of the papers, could on report from the Register and Receiver cancel any entry allowed by the local officers. It is enough to say upon this proposition that the homestead entry of Stewart was ordered cancelled by the Secretary of the Interior, upon evidence taken by the Register and Receiver, and reported in accordance with Rule 52 of the Rules of Practice hereinafter cited. Said rule being as follows:

"Rule 52. The Register and Receiver will forward their report "together with the testimony and all papers in the case to the Commis- "sioner of the General Land Office, with a brief letter of transmittal "describing the case by its title, the nature of the contest, and the tract "involved."

2. Counsel further claim that there is no statute which empowers the the Register and Receiver to hear and decide any contest between a pre-emptor and a prior homestead enterer.

The Township plat, including the land in controversy, was filed December 10, 1883. Stewart's homestead entry was made on the same day, and McHarry's pre-emption declaratory statement was filed December 13, 1883. (Trans. page 14). By Section 2266, R. S., pre-emptors claiming settlement before survey, are allowed three months after the filing of the Township plat in the local land office within which to file their declaratory statements; and by the act of May 14, 1880 (21 Stat., 140), the same privilege is given to homestead claimants. Stewart and McHarry each filed his claim within the three months, and was therefore properly upon the record. A contest was thus created, and the question is how was it to be settled.

Sec. 2478, R. S., provides that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations every part of the provisions of this title (Title XXXII, Public Lands) not otherwise especially provided for. Under this authority the Commissioner adopted and published "Rules of Practice in Cases before the United "States District Land Offices, the General Land Office, and the Depart- "ment of the Interior," approved by the Secretary of the Interior, December 20, 1880.

Such rules have the force and effect of law.

*Poppe* vs. *Atherton*, 42 Cal. 606;
*Frasher* vs. *O'Connor*, 115 U. S. 102;
*Chapman* vs. *Quinn*, 56 Cal. 266.

Rule 5 provides as follows:

"Registers and Receivers may order hearings in the following cases, "wherein entry has not been perfected, and no certificate has been issued "as a basis for patent, viz: * * * 2. Contests "between homestead and pre-emption claimants."

An entry cannot be said to be perfected until everything has been done which the law requires to entitle the entryman to patent. Stewart had made the initiatory filing only. No certificate had been or has ever been issued as a basis of patent upon Stewart's entry. Under the authority conferred by the Statute, the Commissioner on October 1, 1880, issued a general circular of instructions as to the disposition of public lands, which was approved by the Secretary of the Interior (Copp's Public Land Laws, page 247, et seq., Ed. 1883). This circular prescribes the form of application and affidavit to be made by a party applying to make homestead entry; that he must pay the legal fee and that part of the commission which is payable at the time the entry is made, when the Register will issue to him a receipt therefor. This receipt is not issued as a basis for a patent—there is more to be done before final receipt is issued, viz: After the proper lapse of time the applicant must prove by two witnesses faithful observance of the law in regard to settlement and cultivation for the continuous term of five years, and pay to the Receiver that part of the commission unpaid, upon which the Receiver will issue his receipt therefor, and the Register will issue his certificate (form prescribed), and make return to the General Land Office *as a basis of a patent or complete title for the homestead.* P. 257, Copp. Stewart's homestead entry was made on the day the plat was filed, and McHarry's pre-emption claim was filed three days later. Both were in time, under the Statute, and entitled to file their claims. It was proper and lawful under the statute and the Rules of Practice for the Register and Receiver to order a hearing to determine which party, if either, was entitled to the land. All questions affecting the legality of the claim of either party were necessarily involved and at issue. The cases cited by plaintiff in error under this subdivision of their brief relate to final certificates or receipts issued as a basis of patent, when all has been done upon the part of the applicant that the Statute and Rules of Practice require to be done. In such cases, Rule 6 of Rules of Practice hereinbefore cited, provides: That the hearing will be ordered only by direction of the Commissioner of the General Land Office.

Counsel seem to admit that in a case like the one at bar, a hearing may be had before the Register and Receiver, and in this regard say: The only question before the land officers is as to which of the two had the prior right; but, say counsel: "It being shown, and in this case admitted, "that the homestead entry was the prior right, nothing is left to the land "officers but to refuse the pre-emptor's application for a certificate. * "* * * As to fraud in the the original entry, that is a "question in which only the Government is interested, and if it desires to "set aside its contract with the homestead enterer it must apply to the "courts like any other vendor."

We would like to inquire where or how in this case it is shown, or by whom admitted, that the homestead entry was the prior right. On the contrary, the contention is, and has been from the beginning, that Stewart had no right at all to make the entry. But the question as to whether he or McHarry had the *prior* right was not necessarily reached; the determination that Stewart had no right, settled the controversy, so far as he was concerned. It is difficult to understand how it could have been shown that Stewart had the prior right when it appears that he was absolutely without any right in the premises; or how it can be claimed that his prior right is admitted in the face of the record.

It being conceded by counsel that a hearing before the Register and Receiver was proper for the purpose of determining which party had the prior right, such hearing having been had, and it having been decided upon the evidence adduced that Stewart had no right at all in the premises, we fail to see how the plaintiff in error can now be heard to object to the jurisdiction of the Register and Receiver.

The contention that if a homestead entry is once made—that is *initiated*—by the filing of the affidavit and application required by law and the Regulations of the General Land Office, it cannot be cancelled by the officers of the Land Department when it appears in the course of the proceedings for perfecting the entry that it was fraudulently or wrongfully made or allowed, and that the power to cancel rests solely in the courts, is not sustained by the decision of any Court so far as we know. On the contrary the current of authority is the other way. Upon the facts found by the Secretary in this case, his duty even in the absence of an adverse claim, would have required him to refuse a patent to Stewart and cancel the entry, because the facts as found by the Secretary clearly show that Stewart had no right to make the entry, and moreover his entry was fraudulent; and this would be so even if final proof had been made and certificate issued as a basis for a patent.

*Johnson* vs. *Towsley*, 13 Wal. 72;
*Hosmer* vs. *Wallace*, 47 Cal. 461;
*Knight* vs. *U. S. Land Association*, 142 U. S. 161;
*Cornelius* vs. *Kessel*, 128 U. S. 461;
*McDaid* vs. *Oklahoma*, 150 U. S. 215;
*Lee* vs. *Johnson*, *Supra*;
*Bohall* vs. *Dilla*, *Supra*.

Neither is it consistent with the statute which allows any party, be he homestead or pre-emption claimant, to make his initiatory filing within three months after the filing of the Township Plat.

Sec. 2266, R. S.—21 Stat., 140.

## III.

### Decision of the Secretary of the Interior.

Under this subdivision of their brief, counsel for plaintiff in error labor to show that five years continuous residence, either upon the original farm or upon the tract entered as an adjoining farm, is not required by statute. In support of this position the opinion of the Attorney-General is quoted (page 21, plaintiff's brief). That opinion is certainly to the effect that five years residence upon an original homestead *is* necessary; the question before him being as to whether or not the statute required both residence and cultivation by the language, "resided upon " or cultivated the same for the term of five years." He decides that the word "or" in that section was intended to apply to the case provided for in the proviso to the first section, where the right is given to one who owns and resides on an adjoining tract, to enter under the homestead act other land lying contiguous. In such case, says the Attorney-General, residence on the land sought to be entered as a homestead is not essential; *but it will be noticed that he does not declare that residence on the original farm is not necessary.*

An examination of the statute shows that Section 2289 provides for the entry of homesteads. Section 2290 provides that certain affidavits shall be made and filed with the application, and upon the filing of said affidavit and application with the Register and Receiver and payment of certain fees, the applicant shall be permitted to enter the amount of land specified. And Section 2291, following consecutively, and a part of the same statute, provides that no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry * * proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavits, he shall be entitled to a patent. Sec. 2478, R. S., provides, that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations every part of the provisions of this title (Title XXXII, Public Land Laws) not otherwise especially provided for. Under this authority the Commissioner on October 1, 1880, issued a general circular of instructions as to the disposition of public lands, which was approved by the Secretary of the Interior (Copp's Public Land Laws, 1883, page 247). Section 8 of this circular (page 260, Copp's) refers to adjoining farm homesteads and provides as follows:

"In these cases the law allows an applicant *owning* and *residing* on an "original farm to enter other land lying contiguous thereto. * * "In making final proof it is not required that he should prove actual res- "idence on the separate tract entered; but if he does not it must appear "from proof adduced * * that he has continued for the period "required by law to reside upon and cultivate the original farm tract, "making use of the entered tract as a part of the homestead."

Five years has always been held by the Department to be the period required by law. As said by the Supreme Court of the State of California, in its opinion in this case: "It is argued by appellant however, that in "case of an adjoining homestead the requirements of the law applicable to "other homesteads of the public lands do not apply. The rulings of the "Land Department have been otherwise, and we think correctly."

*Carnes* vs. *Smith*, 10 L. D. 100;

*Box* vs. *Cochran*, 3 Id. 394.

"Residence upon the tract of land filed upon is excused, because that "with the land owned is regarded as one homestead, and residence upon "any part is sufficient; but residence is essential to a homestead of either "kind." But it is not necessary to the consideration of this case to determine the question as to whether or not five years continuous residence is required by law, because the statute in terms provides that the applicant must reside on the original farm at the time of his application. Such has been the decision of the Land Department ever since the homestead law was enacted, and counsel for plaintiff in error admit it. (P. 19, Brief).

The circular of instructions above referred to provides: In applying for this class of homesteads the party must make affidavit (form 4—066) describing the tract which he owns and upon which he resides as his original farm. And the form of affidavit prescribed (page 293, Copp's), contains, among other things, the statement: "That I now own and *reside* "upon an original farm, containing * * and is contiguous to "the tract this day applied for."

The Secretary of the Interior has decided upon the proof presented, including the testimony of Stewart and his wife, "that Stewart had not "resided upon the land since 1879, when he removed therefrom to the "town of Martinez, some miles away, where he has, with his family, lived, "and where he has carried on a grocery store and keeps a saloon. The "claim on his part of residence upon the homestead is a mere pretense, "and is only evidenced by occasional excursions or visits by himself and "wife to said land, which has been all the time in the occupation of and "cultivation by a tenant. The town residence has never for a moment "been abandoned, and is not claimed to have been abandoned at any "time." (Opinion on motion for review, p. 3 hereof.)

And in his first decision (page 22, Trans.), he finds that "the proof "shows that Stewart and his family while making a show of residence "on the tract claimed as an original farm, had in fact leased said farm to "to a tenant for a number of years, covering the period of his adjoining "farm entry, and that they in fact resided several miles from said farm, in "the town of Martinez, where Stewart had an established permanent "business, and a residence connected with his place of business." Stewart's entry was made December 10, 1883, so there is a clear finding of fact by the Secretary that Stewart did not reside upon the original farm at the time he made his entry, but had a well established residence miles away, and hence that the statement made in his affidavit at the time he applied to make the entry, that he was residing upon the original farm, was false. This would seem to be conclusive of Stewart's claim, because in order to maintain this action he must show that the patent which was issued to McHarry should have issued to him.

*Lee* vs. *Johnson*, and other cases, *Supra*.

This answers fully, it seems to us, the claim of counsel that the Secretary's decision fails to decide the exact point it should have decided to wit, "whether or not on the day Stewart made his homestead entry he was a resident on the adjoining farm."

## IV.

### Conclusiveness of Secretary's Decision.

As to the conclusiveness of the Secretary's decision upon questions of fact, we cite:

*Johnson* vs. *Towsly*, *Supra*;
*Roseberry* vs. *Wright*, 121 U. S., 488;
*Lee* vs. *Johnson*, *Supra*;
*Shanklin* vs. *McNamara*, 87 Cal. 378;
*Sheply* vs. *Cowan*, 91 U. S. 330;
*Moore* vs. *Robbins*, 96 U. S. 530;
*Quinby* vs. *Conlan*, 104 U. S. 420;
*U. S.* vs. *C. & O. L. Co.*, 148 U. S. 31.

## V.

### Conclusiveness of Secretary's Opinion as to Duress as Excuse for Non-Residence.

Some remarkable allegations were made in the cross-complaint as to what facts were proven at the hearing before the Register and Receiver, which are quoted by counsel for plaintiff in error on pages 24 and 25 of their brief. But counsel seem to have overlooked the fact that the first and probably most important of these allegations was stricken out by the Superior Court, on motion, and is not now, and was not at the time of the hearing of the demurrer in the Superior Court, a part of the cross-complaint. This appears from the order of the court on the motion to strike out (Trans. p. 27). By that order the motion was allowed as to the second paragraph *thereof*. The second paragraph of the motion (p. 30 Trans.) includes the matter contained in the allegation first quoted by counsel under caption V of their brief.

The only object Stewart could have had in alleging or attempting to prove threats and intimidation on the part of McHarry, was to excuse his non-residence upon the original farm. The Secretary of the Interior says as to this in his first opinion (Trans. p. 22):

"The excuse set up by Stewart for such non-residence, viz: that it was "caused by threats of violence and injury at the hands of the McHarrys, "is not sustained by the evidence. Mrs. Stewart testifies that she went "to the farm and remained there for short periods whenever she felt in-"clined, and seems never to have been molested, and no attempt by the "McHarrys to prevent Stewart or his family from residing on the original "farm at any time is shown."

In his decision upon the motion for review (page 3 hereof) he says:

"A number of witnesses were examined at the hearing, and a large "amount of testimony was taken at that time, much of which is conflict-"ing, unsatisfactory and evasive. It has all been gone over patiently, "and from that submitted in behalf of Stewart, including the testimony of "himself and wife, it is quite clear that he has not resided upon the land, "which he claims to own, since 1879, when he removed therefrom to the "town of Martinez, some miles away, where he has, with his family, lived, "and where he has carried on a grocery store and keeps a saloon. The "claim on his part of residence upon the homestead is a mere pretense, "and is only evidenced by occasional excursions or visits by himself and "wife to said land, which has been all the time in the occupation of and "cultivation by a tenant. The town residence has never been for a "moment abandoned, and is not claimed to have been abandoned at any "time. But whilst retaining and occupying it, carrying on business in "connection therewith for years, the bold claim is made that his residence "has been and is upon the homestead tract. This claim has only asser-"tion to support it, while all the facts contradict it.

"The excuse set up by Stewart that he was deterred from maintaining "an actual residence upon the probate homestead because of threats and "fear of violence on the part of the McHarrys, is not supported by the "evidence, is in conflict with his claim of and attempt to show actual resi-"dence thereon, and is contradicted by his own testimony and that of his "wife, wherein it is asserted that they were in the habit of going upon the "land and staying as long as they pleased or found it convenient.

"I therefore hold that the claim of residence, as well as the inconsistent "excuse for failure to maintain the same, are without foundation in law "or fact."

Notwithstanding the fact that the Secretary's several decisions show clearly and unmistakably that the question of duress, threats, and intimidation, was before that officer, and the evidence taken thereon was submitted to and considered by him, from which he found the facts as above stated, the cross-complaint alleges that at the hearing an entirely different state of facts was *proven*. What was sought to be gained by these allegations, if not a review by the court of the decision of the Secretary upon matters of fact cognizable by the Land Department? How could these allegations be proven except by producing the evidence as taken before the Register and Receiver, and considered by the appellate officers?

Counsel have stated many times in their brief that certain matters alleged as facts in the cross-complaint are admitted, evidently upon the theory that for the purposes of the demurrer the allegations of the cross-complaint are taken as true. But the cross-complaint must be construed as a whole and most strongly against the pleader. Plaintiff in error makes the decision of the Secretary of the Interior a part of his cross-complaint, from which it appears that none of the matters alleged as facts proven before the Register and Receiver were so proven, but on the contrary, were shown to be untrue; and hence the cross-complaint carries its own refutation of these allegations.

Inasmuch as the decision of the Department officers upon questions of fact properly before them cannot, in the absence of fraud or imposition, be reviewed by this Court; and such decisions in this case are made a part of the cross-complaint; we cannot be said, even for the purposes of the demurrer, to admit that any facts other than those found by the Secretary of the Interior were proven at the hearing.

## IV.

### Stewart's Title to the Original Farm.

It will be observed that the opinion of the Supreme Court of California in this case was by the Commissioners, and is affirmed by Department One, of said Court, *only as to the question of residence*. The Supreme Court of California consists of a Chief Justice and six Associate Justices. The Court may sit in department or in bank; there are two departments, with three Justices assigned to each; each department has power to hear and determine causes. Within thirty days after judgment pronounced by a department, the Chief Justice and Two Associate Justices may order the cause heard in banc. (Cons. Art. 6.) The Commissioners are merely to assist in the performance of the duties of the Court. (Stat. of Cal. 1889, p. 13.) In this case two of the three judges of Department One concurred in the opinion of the Commissioners only upon the question of residence. In relation to the other question, they declared that it "is a question which "does not arise in this case, and is of too much importance to be unneces-"sarily determined." (See concurring opinion, Trans., p. 46.) Only one of the Justices of Department One (Patterson), concurred fully in the opinion of the Commissioners. Application for hearing in banc was made and denied, and hence the judgment of Department One stands as the judgment of the Court; and it follows that there is no decision of the

State Supreme Court as to whether or not Stewart had such ownership in the land claimed as his original farm as would entitle him to make homestead entry of a contiguous tract, and the Secretary's decision in that regard is not overruled by said Court.

We contend :

1st. That under the statute and regulations of the Department of the Interior, to entitle a person to make adjoining farm homestead entry, he must be the absolute owner of the original farm. It must belong to him to the exclusion of all others. R. S., Sec. 2289, et seq. Secretary's Decision, Trans. p. 21—Circular of Instructions, Copp's Public Land Laws and decisions (Ed. 1883), p. 293, forms of affidavits required No. 4—066 and 4—067, also par. VIII.

2d. That if said deed was not absolutely void it could not take effect for any purpose until the premises were freed from the homestead claim, to wit: in this case until the youngest child arrived at the age of majority, in the year 1892, nine years after the date of the attempted homestead entry.

*Trans. Ex. F.*, p. 23;
*Phelan* vs. *Smith*, 100 Cal., 158;
*Hoppe* vs. *Fountaine*, 104 Cal. 94.

3d. That if the deed was effectual for any purpose it conveyed no more than an undivided interest in the premises described therein, subject to the homestead claim, which is not such ownership in the original farm as the Statute and regulations of the Department of the Interior require.

4th. That ownership of the original farm, such as is required by the statute and rules and regulations thereunder, carries with it the right of possession, as personal residence thereon is required; that under his deed Stewart could not have excluded his grantor from the premises, much less the minor children; neither could he obtain possession as a tenant in common with the widow or minor children, with the consent of the grantor or otherwise.

*Estate of Moore*, 57 Cal. 437;
*Phelan* vs. *Smith*, *Supra*.

In the case last cited, the Court, in referring to Section 1485, Code of Civil Procedure, which the Commissioners in their decision of this case seem to regard as setting aside all doubt, the Court says: That it "relates "only to such purchasers as have succeeded to the rights of all persons "entitled to a homestead, and has no application to a case like the "present, where defendant has succeeded to the right of one only of such "persons."

And the Court further says :

"The right to have a probate homestead carved out of the estate is in "the nature of a charge upon the estate, from which the widow, under "her right of succession, could no more discharge than she could free the "estate from its liability for the debts of her deceased husband.

"The right is inherent, not in her alone, but in the children as well, "and she can no more forclose their right thereto than she can their rights "as heirs to the estate.

"It is conferred for the beneficent purpose of affording a home in "which the minor children may be sheltered and shielded from want.

"To hold that the widow, or any less than all the parties in interest can, "by a conveyance, defeat the object of the law, would be a fraud upon "the rights of those not joining in such conveyance.

"To say that the widow would convey her right to such a homestead, "and that the grantee takes as a tenant in common with the children, is, "in effect, to say that there shall be no homestead. The law consecrates "the homestead to a specific purpose, and that purpose can only be "accomplished by making it a home for the family. * * *

* * "Whether establishing the *status* of the property as a home-"stead had the effect of defeating the title conveyed to defendant *in toto*, "or only to hold it in abeyance, involves considerations of deep import-"ance, which are not necessary to the decision of this case, and upon "which no opinion is expressed."

As above stated, the Supreme Court of California did not decide as to the effect of the deed, whether or not Stewart was in any sense the owner of the original farm, nor whether his ownership therein, if any, was sufficient to entitle him to make adjoining farm entry.

No error of the Supreme Court of California in this regard is specified by plaintiff in error, and therefore this branch of the case is not necessarily before this Court, and perhaps should not be discussed by counsel. Counsel for plaintiff in error having presented argument thereon, we make reply, and desire thus to indicate our willingness to have the question involved considered and decided in this case.

Respectfully submitted,

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